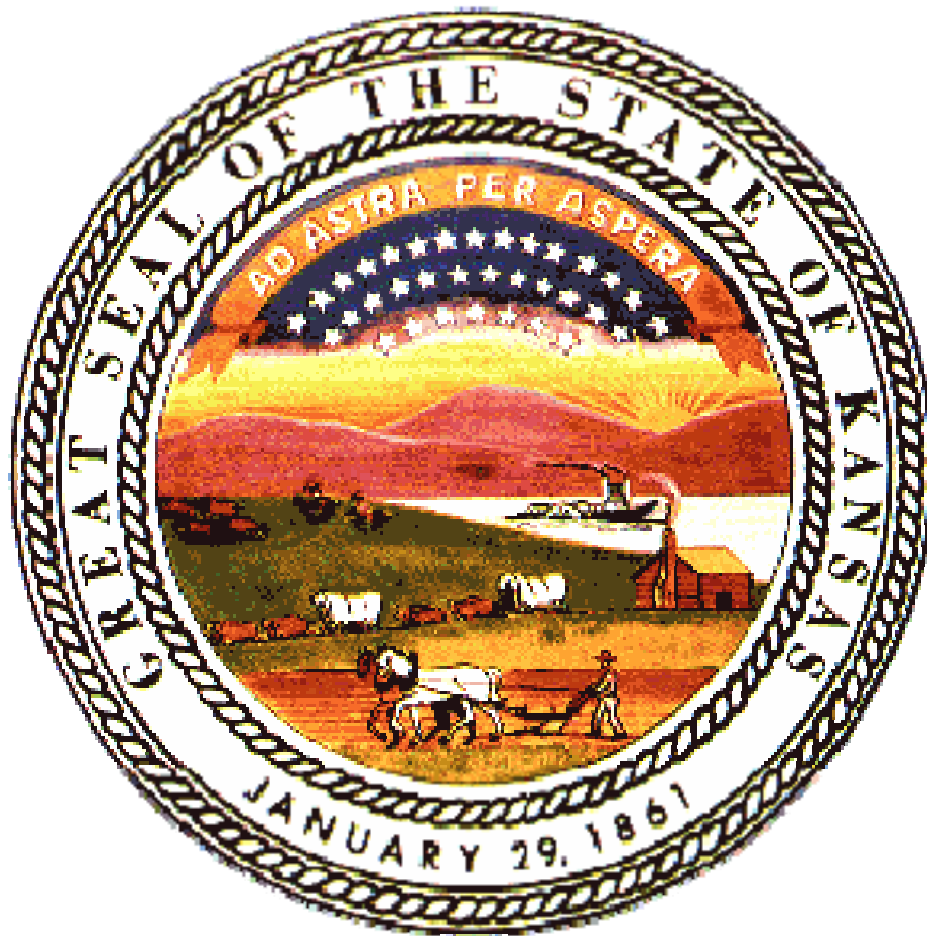


KANSAS

SENTENCING GUIDELINES



DESK REFERENCE MANUAL
2005

KANSAS SENTENCING COMMISSION

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INTRODUCTION

The 2005 Kansas Sentencing Commission Desk Reference Manual (“Manual”) provides general instructions for application of the provisions of the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 21-4701 *et seq.* The Manual contains features that we hope will not only inform users of the latest developments in our Sentencing Guidelines but also help to facilitate more efficient use of the Manual and guidelines application.

For example, all of the 2005 Legislative Changes relative to our Sentencing Guidelines are summarized in one section at the beginning of the Manual. The Case Law annotations contained in Appendix A are in chronological order as of May 27, 2005. The Selected Attorney General Opinions contained in Appendix B have also been updated as of May 27, 2005. In addition, the Chart contained in Appendix C outlining non-statutory departure reasons that have been approved or disapproved by the Kansas appellate courts have been updated reflecting the most recent decisions through May 27, 2005.

The three statutory listings of felonies and misdemeanors in Appendix F and G have also been modified to reflect the specific statutory violations based upon the 2005 Legislative Changes.

Appendix A , Appendix B and Appendix C are only available for downloading from the Kansas Sentencing Commission webpage: www.accesskansas.org/ksc.

The Kansas Sentencing Commission encourages criminal justice professionals to contact our Staff for further information and assistance regarding related questions concerning the Manual, or in the implementation of the Kansas Sentencing Guidelines Act. Questions may be directed to our Staff at (785) 296-0923, or by the e-mail link found on the Kansas Sentencing Commission webpage.

Sentencing provisions in effect at the time of the commission of the crime control the sentence for the offense(s) of conviction. Amendments to statutes are not applied retroactively unless the statutory language clearly indicates the intent to apply the changes retroactively.

Changes to the penalties and/or statutory language, and newly enacted legislation listed within the 2005 Legislative Changes to the Kansas Sentencing Guidelines Act and Related Criminal Law are effective on the date listed below the change(s).

ADDITIONAL COPIES

Requests for additional copies of the 2005 Manual may be obtained from the Kansas Sentencing Commission at a cost of ten dollars each for a bound hard copy document and five dollars each for a computer diskette. This Manual may also be accessed via the Kansas Sentencing Commission web page at: www.accesskansas.org/ksc at no charge.

This Manual is not copyrighted. The entire text of this Manual along with all of the grids, charts and forms, may be reproduced in part or in its entirety by any party wishing to do so. The 2005 Desk Reference Manual should always be used in consultation with the applicable Kansas statutes, the language of which are always controlling.

2005 LEGISLATIVE CHANGES TO THE KANSAS SENTENCING GUIDELINES ACT AND RELATED CRIMINAL LAW

Changes affecting the Kansas Sentencing Guidelines Act (K.S.A. 21-4701 *et seq.*) and other related criminal statutes, were made by the Kansas Legislature during the 2005 Legislative Session. These changes are summarized below under the headings of the Bills in which the changes were included.

Senate Bill No. 13 Amends K.S.A. 2004 Supp. 12-189 (General provisions) to change the penalty from a class B misdemeanor *to* a class A misdemeanor.

Amends K.S.A. 2004 Supp. 75-5133 (Unlawful to divulge licensure, registration and tax information) (d) to change the penalty for a violation of this section from a class B nonperson misdemeanor *to* a class A nonperson misdemeanor.

Amends K.S.A. 2004 Supp. 79-3234 (Tax information; preservation; limits on dissemination and use) (e) to change the penalty for any violation of subsection (b) or (c) from a class B nonperson misdemeanor *to* a class A nonperson misdemeanor.

Amendments are effective upon publication in the statute book.

Senate Bill No. 27 Amends K.S.A. 65-1643 (Registration of Pharmacists; certain acts declared unlawful) to add subsections (k) and (l). Subsection (k) It is unlawful for any person to sell or distribute in a pharmacy a controlled substances designated in subsection (e) or (f) of K.S.A. 65-4113 (Substances included in schedule V) unless:

- (1)(A) such controlled substance is sold or distributed by a licensed pharmacist, a registered pharmacy technician or a pharmacy intern or clerk supervised by a licensed pharmacist; and
- (B) any person receiving, purchasing or otherwise acquiring any such controlled substance produces a photo identification showing their date of birth and signs a log. The log or database must be available for inspection during regular business hours to the board of pharmacy or any law enforcement officer; or
- (2) there is a lawful prescription.

Subsection (l) It is unlawful for any person to sell or distribute in a pharmacy four or more packages or containers of any controlled substance designated in subsection (e) or (f) of K.S.A. 65-4113 to a specific customer within any seven-day period. Violation is a misdemeanor.

Effective June 1, 2005

Amends K.S.A. 65-4113 (Substances included in schedule V) (e) Except as provided in subsection (g), any compound, mixture or preparation containing any detectable quantity of ephedrine, its salts or optical isomers, or salts of optical isomers.

(f) Except as provided in subsection (g), any compound, mixture or preparation containing any detectable quantity of pseudoephedrine, its salts or optical isomers, or salts of optical isomers.

(g) The scheduling of the substances in subsections (e) and (f) do not apply to any compounds, mixtures or preparations of ephedrine or pseudoephedrine which are in liquid, liquid capsule or gel capsule form.

Effective June 1, 2005

Amends K.S.A. 65-7006 (Unlawful acts) to add subsection (d) which requires bail for persons arrested and charged under this section to be at least \$50,000 cash or surety unless the court determines on the record that the defendant is not likely to re-offend, the court imposes pretrial supervision or the defendant agrees to participate in a licensed or certified drug treatment program. Violation of this section remains a drug severity level 1 felony.

Effective April 21, 2005

New Section 4 states that it is the policy of the State of Kansas to restrict access to ephedrine and pseudoephedrine for the purpose of impeding the unlawful manufacture of methamphetamine and requires the Kansas Bureau of Investigation to complete certain tasks in furtherance of this policy.
Effective April 21, 2005

Amends K.S.A. 65-4152 (Simulated controlled substances and drug paraphernalia) to add subsection (e) which requires bail for persons arrested and charged under paragraph (a)(4) to be at least \$50,000 cash or surety unless the court determines on the record that the defendant is not likely to re-offend, the court imposes pretrial supervision or the defendant agrees to participate in a licensed or certified drug treatment program.
Effective April 21, 2005

Amends K.S.A. 65-4159 (Unlawful manufacturing or attempting such of any controlled substance) (c) which requires bail for persons arrested and charged under this section to be at least \$50,000 cash or surety unless the court determines on the record that the defendant is not likely to re-offend, the court imposes pretrial supervision or the defendant agrees to participate in a licensed or certified drug treatment program.
Effective April 21, 2005

New Section 7 states that the provisions of this act and any rules and regulations promulgated thereunder are applicable and uniform throughout this state and in all cities and counties. No city or county may enact or enforce any law, ordinance, rule, regulation or resolution in conflict with, in addition to, or supplemental to the provisions of this act unless expressly authorized by law to do so.
Effective April 21, 2005

Amends K.S.A. 65-7001 (Citation of the Chemical Control Act) K.S.A. 65-7001 through 65-7015 shall be known and cited as the Sheriff Matt Samuels Chemical Control Act.
Effective April 21, 2005

Amends K.S.A. 21-2501a (Maintenance of felony and misdemeanor records) to add subsection (c) which requires every sheriff, police department or countywide law enforcement agency in the state to report, within 30 days, any methamphetamine laboratory seizure or dump sites and any theft or attempted theft of anhydrous ammonia that occurs in such agency's jurisdiction.
Effective April 21, 2005

Senate Bill No. 59 Creates the wildlife violator compact. Specifically, Article XI, Section 3 (a) to create a class A nonperson misdemeanor for any person who knowingly hunts, fishes, traps, possesses, or transports any wildlife, or attempts to do any of the same, within this state in violation of such suspension or revocation pursuant to the wildlife violator compact in addition to a fine and forfeit or suspend the offender's privilege or right to hunt, trap, fish, or otherwise possess or transport any wildlife in this state for a period of not less than two years nor more than five years.
(b) Creates a class A nonperson misdemeanor for any person who knowingly purchases or possesses, or attempts to purchase or possess, a license to hunt, fish, trap, possess or transport wildlife in this state in violation of such suspension or revocation pursuant to the wildlife violator compact in addition to a fine and forfeit or suspend the offender's privilege or right to hunt, trap, fish, or otherwise possess or transport any wildlife in this state for a period of not less than two years.
Effective upon publication in the statute book.

Senate Bill No. 72 Amends K.S.A. 2004 Supp. 21-3707 (Giving a worthless check)

(e)(1)(B) creates a severity level 7 nonperson felony for giving a worthless check more than once within a seven-day period if the combined total of the check, drafts or orders is \$25,000 or more.

(e)(2)(A) is amended to giving a worthless check is a severity level 9 nonperson felony if the check, draft or order is drawn for at least \$1,000 but less than \$25,000.

(e)(2)(B) creates a severity level 9 nonperson felony for giving a worthless check more than once within a seven-day period if the combined total of the checks, drafts or orders is at least \$1,000 but less than \$25,000.

(e)(3) is amended to giving a worthless check is a class A nonperson misdemeanor if the check, draft or order is drawn for less than \$1,000.

(e)(4) is amended to giving a worthless check, draft or order drawn for less than \$1,000 is a severity level 9 nonperson felony if committed by a person who has, within five years immediately preceding commission of the crime, been convicted of giving a worthless check two or more times.

New Section 2 Creates the crime of Trafficking. Section (a) Trafficking is:

(1) Recruiting, harboring, transporting, providing or obtaining, by any means, another person knowing that force, fraud, threat or coercion will be used to cause the person to engage in forced labor or involuntary servitude; or

(2) benefiting financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in subsection (a)(1).

(b) Trafficking is a severity level 2 person felony.

New Section 3 Creates the crime of Aggravated trafficking. Section (a) Aggravated trafficking is:

(1) Trafficking as defined in New Section 2:

(A) Involving the commission or attempted commission of kidnapping as defined in K.S.A. 21-3420;

(B) committed in whole or in part for the purpose of the sexual gratification of the defendant or another; or

(C) resulting in a death; or

(2) recruiting, harboring, transporting, providing or obtaining, by any means, a person under 18 years of age knowing that the person, with or without force, fraud, threat or coercion, will be used to engage in forced labor, involuntary servitude or sexual gratification of the defendant or another.

(b) Aggravated trafficking is a severity level 1 person felony.

All sections are effective upon publication in the statute book.

Senate Bill No. 108 Amends K.S.A. 44-719 (Employment Security Law; Penalties for violation of act; repayment of benefits ineligible to receive, interest thereon) to create a new severity level 9 nonperson felony for violation of subsection (f). Subsection (f) creates the crime of unlawfully reducing or attempting to reduce liability for unemployment contributions by an employing unit.

Effective January 1, 2006

Senate Bill No. 147 Amends K.S.A. 2004 Supp. 21-3106 (Time limitations) (4) to change the statute of limitations for prosecution of any crime, as defined in K.S.A. 21-3105 and amendments thereto, not governed by subsections (1) murder, (2) Kansas public employees retirement system, or (3) sexually violent offenses as defined in K.S.A. 22-3717 and amendments thereto from two years *to* five years after the crime was committed.

Amends K.S.A. 21-3510 (Indecent solicitation of a child) (b) to raise the penalty for Indecent solicitation of a child from a severity level 7 person felony **to** a severity level 6 person felony.

Amends K.S.A. 21-3511 (Aggravated indecent solicitation of a child) to raise the penalty for Aggravated indecent solicitation of a child from a severity level 6 person felony **to** a severity level 5 person felony.

Amends K.S.A. 2004 Supp. 21-3516 (a)(2) to change the definition of Sexual exploitation of a child to allow the defendant to be charged with multiple counts of sexual exploitation of a child for each visual depiction of child pornography. Sexual exploitation of a child is a severity level 5 person felony. All amendments are effective upon publication in the statute book.

Substitute for House Bill No. 2087 Amends K.S.A. 21-3830 (Dealing in false identification documents) (b) to add “banking instrument including, but not limited to, credit or debit card, certified copies of birth, death, marriage and divorce certificates to the definition of identification document. (c) is amended to change the penalty for Dealing in false identification documents from a severity level 10 nonperson felony **to** a severity level 8 nonperson felony. (d) Creates the crime of Vital records identity fraud related to birth, death, marriage and divorce certificates. (e) Vital records identity fraud is a severity level 8 nonperson felony. (f) sections (a) and (b) do not apply to a person less than 21 years of age who uses the identification document of another person to acquire an alcoholic beverage as defined in K.S.A. 8-1599; or to a person less than 18 years of age who use the identification documents of another person to: buy tobacco or cigarette products; communication mediums that contain or depict nudity; admittance to activities that are denied based on age; or an item that is prohibited by law for use or consumption by such person.

Amends K.S.A. 2004 Supp. 21-4018 (Identity theft) (a) to change the definition of identity theft from knowingly and with intent to defraud for “economic” benefit **to** knowingly and with intent to defraud for “any” benefit... (b) is amended to “Identification documents” has the meaning provided in K.S.A. 21-3830 and amendments thereto. (c) is amended to lower the penalty for Identity theft from a severity level 7 person felony **to** a severity level 8 nonperson felony. (d) Creates the crime of Identity fraud. (e) Identity fraud is a severity level 8 nonperson felony.

Amends K.S.A. 65-2434 (Uniform Vital Statistics Act; Penalties) (a) Vital records identity fraud related to birth, death, marriage and divorce certificates shall be prosecuted pursuant to K.S.A. 21-3830 and amendments thereto.

All amendments are effective upon publication in the statute book.

Senate Substitute for House Bill No. 2172 Amends K.S.A. 9-2203 (License required to conduct mortgage business) (c) to change the penalty from a misdemeanor **to** a severity level 7 nonperson felony for a first conviction and a second or subsequent conviction, regardless of its location on the sentencing grid block, is presumptive imprisonment for any person who willfully or knowingly violates any of the provisions of this act, any rule or regulation adopted or order issued under this act. **Note: A second or subsequent conviction pursuant to this statute is reflected as a new special rule on the Presentence Investigation form and Journal Entry of Judgment form.* Effective upon publication in the statute book.

House Bill No. 2180 Amends K.S.A. 2004 Supp. 21-3404 (Involuntary manslaughter) (b) to add subsection (a) of K.S.A. 8-1568 (Fleeing or attempting to elude a police officer).
Involuntary manslaughter is a severity level 5 person felony.

Amends K.S.A. 2004 Supp. 21-3634 (Inherently dangerous felony) (b) to add subsection (18) fleeing or attempting to elude a police officer, as defined in subsection (b) of K.S.A. 8-1568 and amendments thereto.

All amendments are effective upon publication in the statute book.

House Bill No. 2253 Amends K.S.A. 2004 Supp. 32-1032 (Big game and wild turkey violation; penalties) (a)(1) a first or second conviction for a violation of the wildlife and parks laws of this state or the rules and regulation of the secretary relating to this section is a misdemeanor.

(a)(2) creates a class B nonperson misdemeanor, a fine of not less than \$1,000 and confinement in the county jail for not less than 30 days upon a third conviction for a violation of the wildlife and parks laws of this state or the rules and regulations of the secretary relating to this section.

(a)(3) creates a class A nonperson misdemeanor, a fine of not less than \$1,000 and confinement in the county jail for not less than 60 days upon a fourth conviction for a violation of the wildlife and parks laws of this state or the rules and regulations of the secretary relating to this section.

(a)(4) creates a class A nonperson misdemeanor, a fine of not less than \$1,000 and confinement in the county jail for not less than 90 days upon a fifth or subsequent conviction for a violation of the wildlife and parks laws of the state or the rules and regulations of the secretary relating to this section.

Any conviction for a wildlife violation that occurs before July 1, 2005 is not considered for purposes of this section.

Effective upon publication in the statute book.

House Bill No. 2314 Amends K.S.A. 2004 Supp. 22-4906 (a)(1) to require any person required to register as provided in this act to be required to register for a period of 10 years after paroled, discharged or released, whichever date is most recent. The ten year period does not apply to any person who is incarcerated in any jail or correctional facility. The ten year registration requirement does not include any time when any person who is required to register under this act knowingly or willfully fails to comply with the registration requirement.

(b) Upon the first conviction, liability for registration terminates, if not confined, at the expiration of 10 years from the date of conviction, or if confined, ten years from the date of parole, discharge or release, whichever date is most recent. The ten year period does not apply to any person who is incarcerated in any jail or correctional facility. The ten year registration requirement does not include any time when any person who is required to register under this act knowingly or willfully fails to comply with the registration requirement. Liability for registration does not terminate if the convicted offender again becomes liable to register as provided by this act during that period.

(g) requires a person who is adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a sexually violent crime set forth in subsection (c) of K.S.A. 22-4902 shall be required to register until such person reaches 18 years of age, at the expiration of five years from the date of adjudication or, if confined, from the release from confinement, whichever date occurs later. The five year period does not apply to any person while that person is incarcerated in any jail, juvenile facility or correctional facility. The five year registration requirement does not include any time when a person who is required to register under this act knowingly or willfully fails to comply with the registration requirement. Liability for registration does not terminate if the adjudicated offender again becomes liable to register as provided by this act during the requirement period.

Amends K.S.A. 2004 Supp. 22-4909 (Information subject to open records act; nondisclosure of certain information relating to victim) to add subsections (b), (c), (d), and (e). Subsection (b) requires any information posted on an internet website sponsored or created by a sheriff's office or the Kansas Bureau of Investigation to identify, in a prominent manner, whether an offender is or is not a sex offender. (c) requires the state department of education to annually notify any school district or an accredited nonpublic school for kindergarten or any grades one through 12 of the Kansas Bureau of Investigation internet website and any internet website containing information on the Kansas offender registration sponsored or created by the sheriff of the county in which the school is located for the purposes of locating offenders who reside near such school. (d) requires the secretary of health and environment to annually notify any licensed child care facility of the Kansas Bureau of Investigation internet website and any internet website containing information of the Kansas offender registration sponsored or created by the sheriff of the county in which the facility is located for the purpose of locating offenders who reside near such facility. (e) requires the notification in subsections (b) and (c) to include information that the sheriff of the county where such school or child care facility is located is available to assist the school or child care facilities in using the registry and to provide additional information on the registered offenders.

All amendments are effective upon publication in the statute book.

House Bill No. 2380 Creates the Child Rape Protection Act. This Act requires any physician who performs an abortion on a minor who was less than 14 years of age at the time of the commission of the procedure to preserve fetal tissue and submit the tissue sample to the Kansas Bureau of Investigation or laboratory designated by the Director of the Kansas Bureau of Investigation. Failure of a physician to comply with the provisions of this Act is a class A nonperson misdemeanor upon a first conviction and a severity level 10 nonperson felony upon a second or subsequent conviction. Effective upon publication in the statute book.

House Bill No. 2386 Amends K.S.A. 2004 Supp. 21-3520 (Unlawful sexual relations) (a)(6) it is unlawful for an employee of the juvenile justice authority or the employee of a contractor who is under contract to provide direct supervision and offender control services to the juvenile justice authority to engage in consensual sexual intercourse, lewd fondling or touching, or sodomy with a person who is 16 years of age or older and (A) released on conditional release from a juvenile correctional facility under the supervision and control of the juvenile justice authority or juvenile community supervision agency or (B) placed in the custody of the juvenile justice authority under the supervision and control of the juvenile justice authority or juvenile community supervision agency and the employee has knowledge that the person with whom they are engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is currently under supervision. (a)(9) it is unlawful for a court services officer or the employee of a contractor who is under contract to provide supervision services for persons under court services supervision to engage in consensual sexual intercourse, lewd fondling or touching, or sodomy with a person who has been placed on probation under the supervision and control of court services, and the court services officer or employee of a contractor providing supervision services has knowledge that the person with whom they are engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is currently under the supervision of court services; or (a)(10) it is unlawful for a community correctional services officer or the employee of a contractor who is under contract to provide supervision services for persons under community corrections supervision to engage in consensual sexual intercourse, lewd fondling or touching, or sodomy with a person 16 years of age or older who has been assigned to a community correctional services program under the supervision and control of community corrections and the community correctional services officer or employee of a

contractor who is under contract to provide supervision services has knowledge that the person with whom they are engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is currently under the supervision of community corrections.

(b) defines terms used in this act.

(c) Unlawful sexual relations is a severity level 10 person felony.

Effective upon publication in the statute book.

2004 Legislative Change to the KSGA Effective July 1, 2005

K.S.A 17-12a101, L. 2004, ch. 154, §1. Enacting the Kansas Uniform Securities Act.

K.S.A. 17-12a508 (New Section 37) (a) *Criminal penalties*. (1) Except as provided in subsections (a) (2) through (a) (4), a conviction for an intentional violation of this act, or rule adopted or order issued under this act, except section 33 (K.S.A 17-12a504, *Filing requirement*) and amendments thereto, or the notice filing requirements of section 12 (K.S.A.17-12a302, *Required filing of record*) or 22 (K.S.A. 17-12a405, *Notice filing requirement*) and amendments thereto, is a severity level 7 nonperson felony. An individual convicted of violating a rule or order under this act may be fined, but not imprisoned, if the individual did not have knowledge of the rule or order.

(2) a conviction for an intentional violation of section 30 (K.S.A. 17-12a501, *Unlawful acts in connection with the offer, sale or purchase of a security*) or 31 (K.S.A. 17-12a502, *Fraud in providing investment advice*) and amendments thereto is:

(A) a severity level 4 nonperson felony if the violation resulted in a loss of \$100,000 or more;

(B) a severity level 5 nonperson felony if the violation resulted in a loss of at least \$25,000 but less than \$100,000; or

(C) a severity level 7 nonperson felony if the violation resulted in a loss of less than \$25,000.

(3) A conviction for an intentional violation of section 11 (K.S.A. 17-12a301, *Offer or sell security in this state, unlawfully*), 18 (a) (K.S.A. 17-12a401), 18 (c), 19 (a) (K.S.A. 17-12a402), 19 (d), 20 (a) (K.S.A. 17-12a403), 20 (c), 20 (d), 21 (a) (K.S.A. 17-12a404), or 21 (e) (*Registration requirement and Limits on employment or association*) and amendments thereto is:

(A) a severity level 5 nonperson felony if the violation resulted in a loss of \$100,000 or more;

(B) a severity level 6 nonperson felony if the violation resulted in a loss of at least \$25,000 but less than \$100,000; or

(C) a severity level 7 nonperson felony if the violation resulted in a loss of less than \$25,000.

(4) a conviction for an intentional violation of section 34 (K.S.A 17-12a505, *False statements or destruction of records impeding hearings or investigations*) or 35 (K.S.A. 17-12a506, *misrepresenting significance of registrations and filings*) and amendments thereto is a severity level 8 nonperson felony.

(5) any violation of section 11, 18 (a), 18 (c), 19 (a), 19 (d), 20 (a), 20 (c), 20 (d), 21 (a), 21 (e), 30 or 31 and amendment thereto, resulting in a loss of \$25,000 or more shall have a presumptive sentence of imprisonment regardless of its location on the sentencing grid block.

TIME LINE OF SELECTED EVENTS RELATED TO THE KSGA

July 1, 1993

The Kansas Sentencing Guidelines Act (KSGA), at K.S.A. 21-4701 *et seq.*, became law.

March 24, 1994

The limited retroactivity provision of the KSGA found at K.S.A. 1993 Supp. 22-3717(f) was repealed. On March 24, 1994, K.S.A. 1993 Supp. 22-3717(f) was amended so that pre-guideline sentences would not be converted if new crimes were committed while an offender was on parole. This provision had allowed offenders on parole from an indeterminate sentence(s) to have their indeterminate sentence(s) converted to a determinate sentence under the KSGA, if they were convicted of a new crime while out on parole.

K.S.A. 1993 Supp. 21-4603d and 22-3717 were amended to eliminate the requirement that felony probation, parole, postrelease supervision, community corrections, or conditional release must be revoked due to a new conviction for a crime committed on one of these statutes and before a nondeparture term of imprisonment may be imposed for the new conviction, if a nonprison sanction is otherwise the presumed sentencing disposition.

July 1, 1994

Felony Driving Under Influence (DUI) offenses committed on or after this date are nongrid crimes with no guidelines severity level and DUI sentencing is governed exclusively by the penalty provisions of K.S.A. 1994 Supp. 8-1567. Thus a felony DUI conviction can no longer result in a state prison sentence.

The presumptive durations of sentences for crimes committed on or after this date for cases which fall in severity levels 1 thru 5 on the nondrug grid and within criminal history categories A and B are doubled.

April 20, 1995

K.S.A. 21-4706 and 21-4722 were amended. For crimes committed on or after this date, inmates can earn only 15% “good time” credit by which the prison portion of their guidelines sentence can be reduced. Prior to this date an inmate could earn up to a 20% reduction for “good time.”

K.S.A. 75-5217 was amended. For crimes committed on or after this date, the term of imprisonment for technical violations of the conditions of postrelease supervision will be 180 days, subject to a reduction of up to 90 days for good behavior.

K.S.A. 22-3717 was amended. For crimes committed on or after this date, the postrelease supervision term for crimes in nondrug severity levels 1 thru 6 and drug severity levels 1 thru 3, will be 36 months; the term for crimes in nondrug severity levels 7 thru 10 and drug severity level 4, will be 24 months. The postrelease term can be reduced by up to 12 months for good behavior.

July 1, 1996

All Presentence Investigation Report, Journal Entry of Judgment and Journal Entry of Probation Revocation Hearing forms are required to be on a form approved by the Kansas Sentencing Commission.

K.S.A. 21-4704 was amended and presumptive sentence lengths for all nondrug grid severity level 1 and 2 sentences are doubled.

“Border Boxes” were added to the drug grid at levels 3-E, 3-F, 3-G, 3-H, 3-I, 4-E and 4-F.

The pre-guidelines sentence conversion provision under subsection (c) of K.S.A. 21-4705, commonly referred to as the “small sale of marijuana exception” was repealed.

May 29, 1997

K.S.A. 21-4705(c) was amended and the sentencing court is prohibited from distinguishing between cocaine base (904 1 L000) and cocaine hydrochloride (904 1 L005), when sentencing within the sentencing range of the grid block.

July 1, 1998

K.S.A. 1997 Supp. 22-3717 was amended to require that the conviction carrying the longest postrelease supervision period takes precedence when deciding which postrelease term will be controlling in a multiple conviction case. The 60 months postrelease term for sex crimes may be imposed in a multiple conviction case, even though the sex crime may not have been the crime with the highest severity level.

K.S.A. 1997 Supp. 21-4603d(a) was amended. Prior to imposing a dispositional departure for an offender whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid; or prior to the sentencing of an offender to incarceration whose offense is classified in grid blocks 5-H, 5-I, or 6-G of the sentencing guidelines grid for nondrug crimes or in grid blocks 3-E, 3-F, 3-G, 3-H, 4-E or 4-F of the sentencing guidelines grid for drug crimes; or prior to the revocation of a nonprison sanction of an offender whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid or grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes or in grid blocks 3-E, 3-F, 3-G, 3-H, 3-I, 4-E or 4-F of the sentencing guidelines grid for drug crimes, the sentencing court shall consider placement of the offender in the Labette Correctional Conservation Camp, conservation camps established by the Kansas Secretary of Corrections pursuant to K.S.A. 75-52,127 and amendments thereto, or to a community intermediate sanction center.

Pursuant to this statute, the offender shall not be sentenced to imprisonment if space is available in a conservation camp, or to a community intermediate sanction center and the offender meets all the conservation camp’s or the community intermediate sanction center’s placement criteria, unless the sentencing court states on the record the reasons for not placing the offender in a conservation camp or a community intermediate sanction center.

July 1, 1999

The felony provision for a third or subsequent conviction for driving on a suspended license under K.S.A. 8-262(a)(1)(C) was eliminated. Hereafter a second or subsequent conviction for driving while suspended under K.S.A. 8-262 will be a class A nonperson misdemeanor.

The penalty for a conviction under K.S.A. 8-287, the “Habitual Violator” statute, was changed from a severity level 9 nonperson felony to a class A nonperson misdemeanor.

The crime of intentional murder in the second degree, namely K.S.A. 21-3402(a), was moved from an off-grid (Hard 10) offense to a nondrug grid severity level 1 person felony.

K.S.A. 1998 Supp. 21-4603d(a) was further amended to create a new special sentencing rule that provides the sentencing court with the discretion to sentence an offender to imprisonment for a new conviction committed while the offender was on felony bond, even if the offender’s new crime and criminal history classification would otherwise presume a nonprison sentence. Further, a decision by the sentencing court to order an imprisonment sentence in this type of case does not constitute a departure.

K.S.A. 21-4638 was likewise amended to allow for the sentence length increase from the “Hard 40” to the “Hard 50.” This amended statute makes it clear that a person sentenced to the “Hard 50” shall not be eligible for parole prior to serving 50 years imprisonment, and such 50 years imprisonment shall not be reduced by the application of good time credits.

Important changes to K.S.A. 21-4704, included: (1) The presumptive sentence lengths for crimes committed on or after July 1, 1999, which have sentences on severity levels 1 and 2 of the nondrug grid are decreased by 20 percent; (2) the presumptive sentence lengths for crimes committed on or after July 1, 1999, which have sentences on severity level 3 of the nondrug grid are increased by 20 percent; (3) subsection (i) of the statute is amended to clarify that sentences for felony domestic battery [K.S.A. 21-3412(c)(3)], shall not be served in a state facility in the custody of the secretary of corrections; and (4) a new subsection (l) is added to the statute which creates a new special sentencing rule requiring that a sentence for the commission of the burglary of a residence, [K.S.A. 21-3715(a)], shall be presumed imprisonment if the person being sentenced has a prior conviction for burglary of a residence, or a non-residence under subsections (a) or (b) of K.S.A. 21-3715, or a prior conviction for aggravated burglary under K.S.A. 21-3716.

The criminal history aggregation factor for prior convictions for assault, or juvenile adjudications for assault, found at K.S.A. 21-4711(a) was clarified to state that “every three prior adult convictions or juvenile adjudications of assault as defined by K.S.A. 21-3408 and amendments thereto, occurring within a period *commencing* three years *prior to the date of conviction for the current crime of conviction* shall be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes.”

K.S.A. 1998 Supp. 22-3717(b)(2) was amended to increase the length of the off-grid 15 years “life” sentence to 20 years before an offender was eligible for parole for qualifying crimes committed on or after July 1, 1999. Subsection (b)(3) of K.S.A. 1998 Supp. 22-3711 was also amended, for the purpose of specifying that the prior off-grid “Hard 10” life sentence for intentional second degree murder shall not apply to crimes committed on or after July 1, 1999.

K.S.A. 1999 Supp. 21-3522 was created and has been referred to as the “Romeo and Juliet” statute. This new, very specific statute, known as Unlawful Voluntary Sexual Relations, applies to situations where there is voluntary sexual contact between a child who is 14 years of age but less than 16 years of age and an offender who is less than 19 years of age and less than four years of age older than the child. The statute also requires that the child and the offender be the only parties involved in the sexual contact and that the child and the offender are members of the opposite sex. In such cases, if the voluntary sexual contact involves sexual intercourse, the offender will be guilty of a severity level 8 person felony. If the voluntary sexual contact involves sodomy, the offender will be guilty of a severity level 9 person felony. If the voluntary sexual contact involves lewd fondling or touching, the offender will be guilty of a severity level 10 person felony.

In light of the fact that K.S.A. 1999 Supp. 21-3522 (unlawful voluntary sexual relations) is not listed as a crime requiring registration under the Kansas Offender Registration Act at K.S.A. 22-4902, an offender convicted under this section would not be required to register under the Act.

K.S.A. 1998 Supp. 65-4159(b) was amended to provide that a violation of the prohibition against the manufacture of a controlled substance shall be a drug grid severity level 1 felony. Previously a first conviction under K.S.A. 1998 Supp. 65-4159 was a drug grid severity level 2 felony, and a second or subsequent conviction carried a drug grid severity level 1 penalty.

K.S.A. 1998 Supp. 21-4705 was amended by the addition of a new subsection (e) that created a special rule for the sentencing of second or subsequent convictions for the manufacture of a controlled substance under K.S.A. 65-4159. Under this special sentencing rule a second or subsequent violation would be a drug grid severity level 1 offense, but the sentencing court would be required to double the presumptive sentence length. However, the special rule permits the sentencing court to order a reduction of not to exceed 50 percent of the mandatory sentence length increase if mitigating circumstances exist. Any decision made by the sentencing court regarding the allowed reduction would not be considered a departure and would not be subject to appeal.

April 6, 2000

K.S.A. 1999 Supp. 75-5217 was amended to add language at subsection (d) of the statute to state that if a violation of postrelease supervision “results from a conviction for a new misdemeanor, upon revocation, the inmate shall serve a period of confinement, to be determined by the Kansas parole board, which shall not exceed the remaining balance of the period of postrelease supervision.”

May 25, 2000

House Substitute for Senate Bill 323

Increase in County Jail Time - The amount of time an offender could be sentenced to county jail as a condition of an original probation was increased from the current 30 days to 60 days. In addition, an offender could also be sentenced to 60 days jail time for each probation revocation. *However, the increase in county jail time was not retroactive.*

Mandatory Placement in Community Corrections - Condition probation violators were required to be placed in a Community Corrections program at least once prior to a revocation resulting in an offender’s placement in a state correctional facility. There was also an option for the sentencing court to make a public safety exception for direct placement in a state correctional facility. *However, the provision requiring mandatory placement in Community Corrections was not retroactive.*

Modified Periods of Probation - Probation periods for lower severity levels were modified as follows:

Drug Severity Level 3	From 36 Months to 18 Months
Nondrug Severity Level 8	From 24 Months to 18 Months
Nondrug Severity Level 9	From 24 Months to 12 Months
Nondrug Severity Level 10	From 24 Months to 12 Months
Drug Severity Level 4	From 24 Months to 12 Months

Probation periods for all other severity levels remained unchanged. However, there was a public safety provision that allows the sentencing court to impose a longer probation period, which would not be considered a departure. *This provision of the Bill was also retroactive and applied to any offender sentenced under the Kansas Sentencing Guidelines Act.* The Bill also set forth September 1, 2000, as the date by which all conversions or modifications to prior probation sentences must be completed.

No Period of Postrelease Supervision for Conditional Probation Violators - Condition probation violators who were subject to a probation revocation that resulted in the imposition of the underlying prison sentence to be served in a state correctional facility, would not be placed on a period of postrelease supervision upon their release from prison.

1. This provision did not apply to an offender who received a nonprison sentence as the result of a dispositional departure, or was sentenced for a sexually violent offense as defined in K.S.A. 22-3717.
2. This provision did not apply to an offender who received a nonprison sentence whose sentence falls within a border box on either sentencing grid.
3. This provision did not apply to an offender whose revocation to prison was the result of a conviction for a new misdemeanor, or new felony offense.
4. The Kansas Department of Corrections (KDOC) was responsible to review all persons in custody as a result of a nonprison sanction revocation and discharge all such offenders by September 1, 2000.

This provision of the Bill was retroactive and applied to any offender sentenced under the Kansas Sentencing Guidelines Act.

Modified Periods of Postrelease Supervision - Established periods of postrelease supervision were modified as follows:

Nondrug Severity Levels 5-6	From 36 Month to 24 Months
Drug Severity Level 3	From 36 Months to 24 Months
Nondrug Severity Levels 7-10	From 24 Months to 12 Months
Drug Severity Level 4	From 24 Months to 12 Months

Unless indicated above, all other periods of postrelease supervision remain unchanged. The modified periods of postrelease supervision were eligible for the same good time reduction in supervision periods as set forth in the current statute.

The Bill contained a phase-in implementation period for conversion of periods of postrelease supervision as follows:

Nondrug Severity Levels 9 and 10	By September 1, 2000
Drug Severity Level 4	By September 1, 2000
Nondrug Severity Level 7 and 8	By November 1, 2000
Nondrug Severity Level 5 and 6	By January 1, 2001
Drug Severity Level 3	By January 1, 2001

This provision of the Bill was retroactive and applicable to any offender sentenced under the Kansas Sentencing Guidelines Act.

Target Population for Community Corrections - This provision of the Bill defined the target offender population for placement in Community Corrections programs. Adult offenders convicted of felony offenses who met one of the following criteria were to be eligible for placement in Community Corrections:

1. Offenders whose sentence fell within the designated border boxes on both the drug and nondrug sentencing grids;
2. Offenders whose sentence fell within nondrug grid boxes 6-H, 6-I, 7-C, 7-D, 7-E, 7-F, 7-G, 7-H, or 7-I;
3. Offenders whose severity level and criminal history classification designated a presumptive prison sentence but received a nonprison sentence as the result of a dispositional departure;
4. Offenders who received a nonprison sentence and were convicted of a severity level 7 or higher sex offense as defined in K.S.A. 22-4902, regardless of the manner in which the sentence was imposed;
5. Any offender who violated conditions of release, or assignment, or a presumptive nonprison sentence prior to revocation to a state correctional facility;
6. Any offender determined to be high risk/high needs, or both by the use of a statewide mandatory standardized risk assessment tool, or instrument validated for Community Corrections placement. A validated risk assessment tool would be provided by the Kansas Department of Corrections; and
7. Any offender who successfully completed an assignment to a conservation camp program.
8. The Bill contained a provision that allowed the placement of juvenile offenders in Community Corrections programs if the local Community Corrections Advisory Board approved. However, grants from the Community Corrections Fund administered by the Kansas Secretary of Corrections could not be used for this service.
9. The Bill contained a public safety provision that allowed direct placement in prison if the sentencing court set forth with particularity why placement in Community Corrections would jeopardize public safety, or would not be in the best interests of the offender.

This provision of the Bill was not retroactive.

July 1, 2000

K.S.A. 1999 Supp. 21-4720(b) was amended for situations where an offender was convicted and sentenced in a multiple conviction case, then the primary crime of conviction was reversed on appeal, but other convictions in the case are affirmed. In such a case the appellate court was to remand the case for resentencing and the sentencing court would assign a new primary crime, use the offender's full criminal history score for that primary crime and resentence the offender. A new aggravating departure factor was created for the nondrug grid (K.S.A. 21-4716) for those cases where "the defendant was incarcerated during the commission of the offense." A new aggravating departure factor was created for the drug grid (K.S.A. 21-4717) for those cases where "the offender was incarcerated during the commission of the offense."

July 1, 2001

K.S.A. 2000 Supp. 8-1567 (the DUI statute) was amended to make fourth and subsequent DUI convictions subject to a sentence of from 90 days to 1 year in a county jail, with the jail portion of 72 hours being mandatory incarceration, the remainder of the 90 days eligible for a work release program. After serving this sentence, an offender would be placed in a treatment program under the custody of the Secretary of the Kansas Department of Corrections (KDOC). Upon completion of the treatment program, an offender would be placed in an after care program approved by the Kansas Parole Board for a period of 12 months. *An offender who violates the conditions of the aftercare program is treated as a condition violator and subject to imprisonment in a KDOC facility for up to 6 months.*

The 5 year "decay" rule limiting an offender's DUI convictions to only those which occurred within the past 5 years as counting for an offender's first, second or third offense was deleted. *All prior DUI convictions are to be included and there was no provision for retroactivity.* K.S.A. 21-4711 was amended to include DUI convictions and diversion agreements from other states, and also includes convictions under city ordinances and county resolutions as violations of the DUI statute for criminal history scoring under the Kansas Sentencing Guidelines Act.

May 2, 2002

The criminal threat statute (K.S.A. 21-3419) was amended to modify the present severity level 9 nonperson felony offense to also include threats made to endanger the food supply. It also created the crime of endangering the food supply, which includes: a new class A nonperson misdemeanor offense; a new severity level 4 nonperson felony offense if the crime involves foot-and-mouth disease; a new severity level 3 nonperson felony offense if the crime is done with the intent to cause damage to plants or animals, or to cause economic harm or social unrest; and a new severity level 3 person felony offense if the crime is done with the intent to cause illness, injury, or death to a human being.

May 23, 2002

The Viatical Settlement Act was created which includes: a new severity level 7 nonperson felony offense if the value of the viatical settlement contract is \$25,000 or more; a new severity level 9 nonperson felony offense if the value is > \$500 but < \$25,000; a new class A nonperson misdemeanor offense if the value is < \$500; and a new severity level 9 nonperson felony offense if the value of the insurance premium is \$500 or less, if the offender has been convicted of two or more violations within the previous five years.

July 1, 2002

The arson statute (K.S.A. 2001 Supp. 21-3718) was amended to create a new severity level 7 person felony offense for “accidentally, by means of fire or explosive as a result of manufacturing or attempting to manufacture a controlled substance in violation of K.S.A. 65-4159, and amendments thereto, damaging any building or property which is a dwelling.” In addition, it also creates a new severity level 7 nonperson felony offense for “accidentally, by means of fire or explosive as a result of manufacturing or attempting to manufacture a controlled substance in violation of K.S.A. 65-4159, and amendments thereto, damaging any building or property which is not a dwelling.”

A new severity level 6 nonperson felony offense was created for tampering with a pipeline. The crime of tampering with a pipeline “includes but is not limited to, any intentional unauthorized adjustment, opening, removal, change or destruction of any part of any pipeline.”

Amended the DUI statute (K.S.A. 2001 Supp. 8-1567) to create the offense of driving under the influence of an “inhalant.” In addition, toxic vapors was added to the definition of “drugs” under the DUI statute so that a DUI offense may be prosecuted for driving under the influence of toxic vapors.

The definition of unlawful sexual relations was expanded to include “contracted employees” of a contractor that provides supervision services for persons on parole, conditional release, or post release supervision. This added an additional group of potential offenders to the severity level 10 person felony offense under K.S.A. 2001 Supp. 21-3520.

Subsection (b) of the stalking statute (K.S.A. 2001 Supp. 21-3438) was amended to create an additional level 9 person felony offense for violation of any Protection from Stalking Act Order. Amends subsection (c) to create an additional level 8 person felony offense if an offender has a second or subsequent conviction within seven years of a prior conviction under subsection (a) if it involves the same victim.

July 1, 2003

K.S.A. 21-4729 was created. K.S.A. 21-4729 (2003 Senate Bill 123) requires participation in a certified drug abuse treatment program under community corrections supervision for a defined target population of nonviolent adult offenders convicted of K.S.A. 65-4160 or 65-4162 with no prior convictions of drug trafficking, drug manufacturing or drug possession with intent to sell. As part of the presentence investigation, offenders convicted of 65-4160 or 65-4162 will receive a drug abuse assessment. The drug abuse assessment will assess the offender’s risk of re-offending and the level of their substance abuse problem. At sentencing, the court must commit the offender to treatment in a certified drug abuse treatment program. The offender will remain in treatment until determined suitable for discharge from treatment by the court. The offender may remain in treatment and/or on supervision for up to 18 months. All offenders sentenced to drug abuse treatment under K.S.A. 21-4729 are supervised by community corrections. All sentences under K.S.A. 21-4729 result in a drug severity level 4 felony conviction.

Goal of the Alternative Drug Policy - The goal of certified drug abuse treatment is to provide community based punishment and the opportunity for treatment to nonviolent adult offenders with drug abuse problems in order to more effectively address the revolving door of drug addicts through the state prisons, which should be reserved for serious, violent offenders.

Target Population - The target population of offenders for placement in a certified drug abuse treatment program is:

- A) Current and most severe offense of conviction is drug possession;
- B) Criminal history classifications of E to I (Mandatory placement);

Mandatory participation in a certified drug abuse treatment program is for adult offenders sentenced in the 4-E, 4-F, 4-G, 4-H, or 4-I (presumptive probation) boxes of the drug grid, with no prior conviction of:

- K.S.A. 65-4142 (the unlawful acts involving proceeds derived from violations of the uniform substances control act statute);
- K.S.A. 65-4159 (the unlawful manufacturing or attempting such of any controlled substance statute);
- K.S.A. 65-4161 (unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants statute);
- K.S.A. 65-4163 (the unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances statute);
- K.S.A. 65-4164 (the unlawful acts relating to certain narcotic drugs statute); or
- Any similar offenses from another jurisdiction.

Certified drug abuse treatment with court finding is for adult offenders sentenced in the 4-A, 4-B, 4-C, or 4-D (presumptive prison) boxes of the drug grid, with no prior conviction of:

- K.S.A. 65-4142 (the unlawful acts involving proceeds derived from violations of the uniform substances control act statute);
- K.S.A. 65-4159 (the unlawful manufacturing or attempting such of any controlled substance statute);
- K.S.A. 65-4161 (unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants statute);
- K.S.A. 65-4163 (the unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances statute);
- K.S.A. 65-4164 (the unlawful acts relating to certain narcotic drugs statute); or
- Any similar offenses from another jurisdiction.

- C) Offenders with prior convictions for drug possession are eligible;
- D) Offenders with prior convictions for person felonies are eligible for certified drug abuse treatment, if such person felonies were severity level 8, 9, or 10 or nongrid offenses and the sentencing court determines and sets forth with particularity, that public safety will not be jeopardized by placement of the offender in a certified drug abuse treatment program.

Sentencing Policy Changes - Mandatory drug abuse treatment in lieu of incarceration resulted in several changes in sentencing practices for offenders convicted of drug possession. These changes focus on various levels of treatment options, establishment of certain and immediate sanctions for continued drug usage, and a comprehensive continuum of sanctions that include offender accountability, while ensuring public safety. Since this is a post conviction sentencing policy, all convictions under K.S.A. 21-4729(2003 Senate Bill 123) result in a felony conviction. Current sentencing practices and procedures are:

- All felony drug possession convictions are sentenced on severity level 4 of the drug grid.

- Adult offenders with current possession convictions, criminal history 4-E to 4-I (presumptive probation boxes) of the drug grid, with no prior convictions of drug trafficking, drug manufacture or drug possession with intent to sell receive mandatory certified drug abuse treatment.
- Adult offenders with current possession convictions, criminal history 4-A to 4-D (presumptive prison boxes) of the drug grid, with no prior convictions of drug trafficking, drug manufacture or drug possession with intent to sell are eligible for certified drug abuse treatment if the court finds that the placement of these offenders in a certified drug abuse treatment program will not jeopardize public safety. The prior person felony convictions can only be severity level 8, 9, or 10 or nongrid offenses.
- An offender with a third drug possession conviction and having participated in at least one prior 18 month certified drug abuse treatment program, will be sentenced to a mandatory 20 month prison term.
- Mandatory participation in a certified drug abuse treatment program for offenders sentenced under K.S.A. 21- 4729 (2003 Senate Bill 123) is for a term of up to 18 months.
- Upon successful completion of a certified drug abuse treatment program, the offender will be discharged and not subject to a period of postrelease supervision.
- K.S.A. 21-4729 (2003 Senate Bill 123) applies to offender with offenses committed on or after November 1, 2003, and is not applied retroactively.

Offender Accountability: Offenders who violate conditions of a certified drug abuse treatment program are subject to additional nonprison sanctions. Such nonprison sanctions include but are not limited to: up to 60 days in a county jail, fines, community service, intensified treatment, house arrest and electronic monitoring.

Offenders shall be discharged from treatment if the offender is convicted of a new felony other than a conviction of K.S.A. 65-4160 or 65-4162 or the offender has a pattern of intentional conduct demonstrating the offender's refusal to comply with or to participate in the treatment program, **as established by a judicial finding**. An offender whose probation is revoked shall serve their underlying prison sentence without any credit for time spent participating in the treatment program.

Offender Assessment: As part of the presentence investigation, all offenders who meet the requirements of K.S.A. 21-4729 (2003 Senate Bill 123) are subject to a drug abuse assessment. The drug abuse assessment will assess the offender's risk of re-offending and the level of their substance abuse problem. The drug abuse assessment must be completed pursuant to a statewide, mandatory, standardized risk assessment tool, including a clinical interview with a mental health professional.

Treatment Structure: Certified drug abuse treatment programs are required to provide one or more treatment options in the continuum of services needed to reach recovery. Certified drug abuse treatment programs include a full cognitive based curriculum in addition to or as part of treatment and may include community based or faith based programs. The state-wide comprehensive drug treatment delivery system includes a continuum of services that allows the offender to move up or down the continuum as the recovery process requires. Regardless of the level of substance abuse treatment assessed, all treatment plans will include an aftercare component.

It may be necessary for residential placements to be outside of an offender's local community especially in rural areas, given the current limited number of facilities available and their geographic locations.

Treatment Providers: Treatment providers are required to obtain Kansas Department of Corrections (KDOC) certification in addition to any other state licensing or certification required to provide drug and alcohol abuse treatment. KDOC counselor certification is based on case management, cognitive behavior tool skills acquisition and facilitation ability.

July 1, 2004

K.S.A. 2003 Supp. 21-4635 was amended to create the new sentence of life imprisonment without the possibility of parole. A defendant convicted of capital murder, pursuant to K.S.A. 21-3439, and amendments thereto, where a sentence of death is not imposed, will be sentenced to life imprisonment without the possibility of parole. A defendant sentenced to life imprisonment without the possibility of parole is not eligible for parole, probation, assignment to a community correctional service program, conditional release, postrelease supervision, or suspension, modification or reduction of sentence. The sentence of death or life imprisonment without the possibility of parole does not apply to juveniles or those determined to be mentally retarded.

K.S.A. 22-5101 created the Kansas Criminal Justice Recodification, Rehabilitation, and Restoration Project (3 R's Committee). This project is designed to recodify the criminal code, identify ways to rehabilitate offenders and work with offenders on community based supervision, and identify ways to restore offenders back into society as productive members.

K.S.A. 21-3608a created the crime of aggravated endangering a child, a severity level 9 person felony. Aggravated endangering a child is:

- (1) Intentionally and recklessly causing or permitting a child under the age of 18 years to be placed in a situation in which the child's life, body or health is injured or endangered;
- (2) permitting such child to be in an environment where a person is selling, offering for sale or having in such person's possession with intent to sell, deliver, distribute, prescribe, administer, dispense, manufacture or attempt to manufacture any methamphetamine as defined by subsection (d)(3) or (f)(1) of K.S.A. 65-4107, and amendments thereto; or
- (3) permitting such child to be in an environment where drug paraphernalia or volatile, toxic or flammable chemicals are stored for the purpose of manufacturing or attempting to manufacture any methamphetamine as defined by subsection (d)(3) or (f)(1) of K.S.A. 65-4107, and amendments thereto.

The threshold for a class A nonperson misdemeanor was raised from \$500 to \$1,000 for violations of K.S.A. 2003 Supp. 21-3701 (Theft statute) and K.S.A. 21-3704 (Theft of services statute).

2005 Kansas Legislative Session

A number of changes were made to Kansas criminal laws during the 2005 Kansas Legislative Session. For a full description of the changes made, please see the **“2005 LEGISLATIVE CHANGES TO THE SENTENCING GUIDELINES ACT AND RELATED CRIMINAL LAW”** section of this Manual.

CHAPTER I: THE BASICS OF THE SENTENCING GUIDELINES

Sentencing Considerations

The sentencing court should consider all available alternatives in determining the appropriate sentence for each offender. The sentencing guidelines seek to establish equity among like offenders in typical case scenarios. Rehabilitative measures are still an integral part of the corrections process, and criminal justice professionals will continue their efforts in reestablishing offenders within communities. The guidelines do not prohibit sentencing courts from departing from the prescribed sentence in atypical cases. The sentencing court is free to choose an appropriate sentence, or combination of sentences, for each case. See K.S.A. 2004 Supp. 21-4603d.

Sentencing Guidelines

The Kansas Sentencing Guidelines Act (KSGA) became effective July 1, 1993. Two grids, which contain the sentencing range for drug crimes and nondrug crimes, were developed for use as a tool in sentencing. The sentencing guidelines grids provide practitioners in the criminal justice system with an overview of presumptive felony sentences. The presumptive sentence is determined by two factors: the severity level of the current crime of conviction and the offender's criminal history. The grid box where the severity level of the crime and the offender's total criminal history score intersect is the presumed sentence in months. See K.S.A. 2004 Supp. 21-4704.

Off-Grid Crimes

The crimes of capital murder (K.S.A. 21-3439), murder in the first degree (K.S.A. 21-3401) and treason (K.S.A. 21-3801) are designated as off-grid person crimes. The term of imprisonment shall be imprisonment for life. Persons convicted of off-grid crimes, other than capital murder, will be parole eligible after serving 25 years in confinement for premeditated first-degree murder, or 40 or 50 years in certain premeditated first-degree murder cases in which aggravating circumstances are found by the sentencing court. Kansas law also provides for the imposition of the death penalty under specified circumstances, for a conviction of capital murder. See K.S.A. 21-3439 and K.S.A. 2004 Supp. 21-4624. Felony murder and treason carry a term of life imprisonment with a 20 years parole eligibility date. See K.S.A. 2004 Supp. 22-3717(b)(2).

The crime of Intentional Second Degree Murder, K.S.A. 1998 Supp. 21-3402(a), previously an off-grid person crime, was placed back on the grid as a nondrug grid severity level 1 offense for crimes committed on or after July 1, 1999.

K.S.A. 2003 Supp. 21-4635 was amended to create the sentence of life imprisonment without the possibility of parole. A defendant convicted of capital murder and not sentenced to death will receive a sentence of life imprisonment without the possibility of parole. (Effective for offender's convicted of capital murder for crimes committed on or after July 1, 2004) The death penalty and the sentence of life imprisonment without parole do not apply to juveniles or persons determined to be mentally retarded.

Drug Grid and Nondrug Grid

There are two grids used for sentencing on felony convictions. The drug grid is used for sentencing on drug crimes described in K.S.A. Chapter 65, Article 41. The nondrug grid is used for sentencing on all other felony crimes. Both grids are similar in appearance. The criminal history categories make up the horizontal axis and the crime severity levels make up the vertical axis. Each grid contains nine criminal history categories. The drug grid contains four severity levels, the nondrug grid contains ten severity levels. A thick, black dispositional line cuts across both grids. Above the

dispositional line are unshaded grid boxes, which are designated as presumptive prison sentences. Below the dispositional line are shaded grid boxes, which are designated as presumptive probation sentences.

The grids also contain boxes that have vertical lines passing through them, which are referred to as “border boxes.” A border box has a presumptive prison sentence but the sentencing court may choose to impose an optional nonprison sentence, which will not constitute a departure. The nondrug grid contains three border boxes, in levels 5-H, 5-I and 6-G. The drug grid contains five border boxes, in levels 3-E, 3-F, 3-G, 3-H and 3-I. See K.S.A. 2004 Supp. 21-4704 and K.S.A. 2004 Supp. 21-4705.

The drug grid border boxes were reduced from seven to five for sentencing of K.S.A. 65-4160 or 65-4162 violations on and after November 1, 2003, as a result of K.S.A. 21-4729 (2003 Senate Bill 123).

Grid Boxes

Within each grid box are three numbers, representing months of imprisonment. The three numbers provide the sentencing court with a range for sentencing. The sentencing court has discretion to sentence at any place within the range. The middle number in the grid box is the standard number and is intended to be the appropriate sentence for typical cases. The upper and lower numbers should be used for cases involving aggravating or mitigating factors insufficient to warrant a departure. See K.S.A. 2004 Supp. 21-4704 and 21-4705.

The sentencing court may depart upward to increase the length of a sentence up to double the duration within the grid box. The court may also depart downward to lower the duration of a presumptive sentence to any extent. See K.S.A. 2004 Supp. 21-4716, 21-4717 and 21-4718. The court may also impose a dispositional departure when aggravating or mitigating circumstances exist that are substantial and compelling. See K.S.A. 21-4719(c)(2).

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departure sentences. In the 2002 Legislative Session both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to correct the upward durational departure problem arising from *Gould* and this change became effective on June 6, 2002. The jury now determines all of the aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. The trial court determines if the presentation of evidence regarding the aggravating factors will be presented during the trial of the matter, or in a bifurcated jury proceeding following the trial. See K.S.A. 2004 Supp. 21-4718.

CHAPTER II: PROCEDURE PRIOR TO SENTENCING

Determination of the Date of Offense; Application to the Sentencing Guidelines

The Kansas Sentencing Guidelines Act (KSGA) applies to all felony crimes committed on or after July 1, 1993. All felony crimes committed prior to that date should be prosecuted under the laws existing prior to that date. A crime is committed prior to July 1, 1993, if any essential elements of the crime as then defined occurred before July 1, 1993. If it cannot be determined that the crime was committed prior to or after July 1, 1993, the offender should be prosecuted under laws existing prior to the KSGA. See K.S.A. 21-4723.

Accusatory Instruments

All accusatory instruments filed for crimes to be sentenced under the KSGA system should allege facts sufficient to classify the crime severity level of the offense on the guidelines grid. If a particular felony crime is subclassified into different versions of the same offense that have been assigned different severity levels, the accusatory instrument should include facts sufficient to establish the required elements of the version of the offense carrying the severity level reflected in the accusatory instrument. See K.S.A. 2004 Supp. 22-3201.

Fingerprinting; Sentencing Guidelines Implications

Municipal Court Duties The court is required to ensure that fingerprints are taken upon conviction for a city ordinance violation comparable to a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 21-3408. See K.S.A. 12-4517.

Law Enforcement Duties Every sheriff, police department or countywide law enforcement agency in the state is required to make two sets of fingerprint impressions of a person who is arrested if the person is wanted for the commission of a felony. On or after July 1, 1993, fingerprints shall also be taken if the person is wanted for the commission of a class A or B misdemeanor or a violation of a county resolution which would be the equivalent of a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 21-3408. See K.S.A. 21-2501(a)(1).

County/District Court Duties The court shall ensure, upon the accused person's first appearance, or in any event, before final disposition of a felony or a class A or B misdemeanor or a violation of a county resolution which prohibits an act which is prohibited by a class A or B misdemeanor, the offender has been processed and fingerprinted. See K.S.A. 21-2501(b).

Juvenile Court Duties The court must ensure upon first appearance, or in any case, before final disposition that the offender has been processed and fingerprinted. This rule is applicable to those offenders charged with an offense which, if committed by a person 18 or more years of age, would be a felony, a class A or B misdemeanor, or assault as defined by K.S.A. 21-3408. See K.S.A. 2004 Supp. 38-1611.

Official Records

The Kansas Bureau of Investigation (KBI) is required to maintain a permanent record of all felony offenses, misdemeanors involving controlled substances, all class A and B misdemeanors and all assaults as defined in K.S.A. 21-3408. Law enforcement agencies must provide this information, on a form approved by the Kansas Attorney General, for all felony offenses reported or known to have been committed within their respective jurisdictions, all misdemeanors or other offenses which involve the violation of the uniform controlled substances act and, on or after July 1, 1993, all class A or B

misdeemeanors, and all assaults as defined in K.S.A. 21-3408, reported or known to have been committed within their respective jurisdictions within 72 hours after the offense is reported, or is known to be committed. See K.S.A. 21-2501a.

Plea Agreement Rules

The parties may move to dismiss any charge or counts pursuant to a plea bargain. The parties may stipulate to a particular sentence within the grid block classification appropriate for an offender given his or her crime of conviction and complete criminal history score. The parties may agree to recommend a sentence outside the presumptive range on the grid when departure factors exist. These factors must be stated on the record. The State may agree to file or not to file specific charges or counts. A plea agreement involving the deliberate deletion of an offender's prior convictions from criminal history or an agreement by the prosecution to disregard any prior convictions of the offender which will elevate the severity level of the offense or count in the offender's criminal history is impermissible. See K.S.A. 21-4708(b)(2) and K.S.A. 21-4713.

After a plea agreement has been accepted, the severity level may not be "elevated or enhanced for sentencing purposes" as the result of the discovery of prior convictions or any other basis for such enhancement. See K.S.A. 21-4707(b)(4).

The sentencing court is free to accept or reject any plea agreement entered into by the parties. Before accepting any plea of guilty or nolo contendere, the court must inform the offender of the specific severity level of the crime and the range of penalties associated with that severity level. See K.S.A. 2004 Supp. 22-3210.

Diversions

Diversion agreements cannot be entered into for a class A or B felonies, or for crimes committed on or after July 1, 1993, for off-grid crimes, nondrug severity level 1, 2 and 3 felonies, and drug severity level 1 and 2 felonies. See K.S.A. 22-2908.

Deferring Sentence Pending Mental Examination

A mental examination may be completed on the offender as part of the presentence investigation report. The sentencing court may commit the offender to a state security hospital or suitable local mental health facility for a mental examination. The maximum duration of the commitment that can be imposed is 120 days. See K.S.A. 22-3429.

Drug Abuse Assessment

As a result of K.S.A. 21-4729 (2003 Senate Bill 123), a drug abuse assessment must be completed pursuant to a statewide, mandatory, standardized risk assessment tool and an instrument validated for drug abuse treatment placements, including a clinical interview with a mental health professional. The presentence risk-need assessment shall be conducted by a community corrections officer.

The drug abuse assessment is only available to the parties, the sentencing court, the department of corrections and if requested, the Kansas Sentencing Commission. See K.S.A. 2004 Supp. 21-4714(c).

The drug abuse assessment must be conducted by a drug abuse treatment program certified by the department of corrections to provide assessment and treatment services pursuant to K.S.A. 2004 Supp. 75-52,144 (b).

CHAPTER III: CRIME SEVERITY LEVELS

General Rules for Determining Severity Levels

The severity levels range from severity level 1 to severity level 10 on the nondrug grid. Level 1 is used to categorize the most severe crimes and level 10 is used to categorize the least severe crimes. Crimes listed within each level are considered relatively equal in severity. See K.S.A. 21-4707(a).

The crime severity scale contained in the sentencing guidelines grid for drug crimes consist of four levels of crimes. Crimes listed within each level are also considered relatively equal in severity. Level 1 is used to categorize the most severe crimes and level 4 is used to categorize the least severe crimes. No plea bargain may be entered into which involves an agreement from the prosecutor to disregard any prior drug conviction(s) that elevate the severity level of a drug crime on the drug grid. See K.S.A. 21-4708(b)(2).

The sentencing court will designate the appropriate severity level if it is not provided by statute. The following provisions shall be applicable with regard to ranking offenses according to the crime severity scale:

- (1) When considering an unranked offense in relation to the crime severity scale, the sentencing court should refer to comparable offenses on the crime severity scale; see K.S.A. 21-4707(c)(1).
- (2) Except for off-grid felony crimes, which are classified as person felonies, any felony crimes omitted from the crime severity scale shall be considered nonperson felonies; see K.S.A. 21-4707(c)(2).
- (2) All unclassified felonies shall be scored as level 10 nonperson crimes; see K.S.A. 21-4707(c)(3).

All felony crimes with the exception of capital murder (K.S.A. 21-3439), first-degree murder (K.S.A. 21-3401), treason (K.S.A. 21-3801), felony driving under the influence (K.S.A. 2004 Supp. 8-1567), and felony domestic battery (K.S.A. 2004 Supp. 21-3412a), should be categorized in one or more of the crime severity levels. The severity level designation of each felony crime is included in the statutory definition of the crime.

Some crimes include a broad range of conduct. In such circumstances, there may be a different severity level designated for violations of different subsections of the statute. All of the KSGA felonies are listed in Appendix E of this Manual in three versions: numerically by statute number; alphabetically by description; and by severity level and then by statute number.

Pleas

At the time of acceptance of a plea of guilty or nolo contendere, the sentencing court must inform the offender of the specific severity level of the crime and the range of penalties associated with that severity level. Once the guilty or nolo contendere plea has been accepted by the court, the severity level of the crime cannot be elevated for sentencing purposes due to the subsequent discovery of prior convictions which would have raised the severity level of the crime; instead the prior convictions will be used in the determination of the criminal history category. See K.S.A. 4704(b)(4).

Anticipatory Crimes

The anticipatory crimes outlined in K.S.A. 21-3301 (attempt), K.S.A. 21-3302 (conspiracy) and K.S.A. 21-3303 (solicitation), are treated differently for off-grid felonies, offenses on the nondrug grid and drug grid, and misdemeanor offenses.

Attempt

An attempt to commit an off-grid felony shall be ranked at nondrug severity level 1.

An attempt to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for an attempt to commit a nondrug felony shall be a severity level 10.

An attempt to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid box for an underlying or completed crime by six months.

The provision for the reduction of a sentence on the drug grid by six months for an attempted crime does not apply in cases involving an attempt to manufacture a controlled substance under K.S.A. 65-4159. See K.S.A. 65-4159

An attempt to commit a class A person misdemeanor is a class B person misdemeanor. An attempt to commit a class A nonperson misdemeanor is a class B nonperson misdemeanor. An attempt to commit a class B or C misdemeanor is a class C misdemeanor.
See K.S.A. 21-3301.

Conspiracy

Conspiracy to commit an off-grid felony shall be ranked at nondrug severity level 2.

Conspiracy to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for conspiracy to commit a nondrug felony shall be a severity level 10.

Conspiracy to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid box for an underlying or completed crime by six months.

Conspiracy to commit a misdemeanor is a class C misdemeanor.
See K.S.A. 21-3302.

Solicitation

Criminal solicitation to commit an off-grid felony shall be ranked at nondrug severity level 3.

Criminal solicitation to commit any other nondrug felony shall be ranked on the nondrug scale at three (3) severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for solicitation to commit a nondrug felony shall be a severity level 10.

Criminal solicitation to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid box for an underlying or completed crime by six months.
See K.S.A. 21-3303.

CHAPTER IV: CRIMINAL HISTORY

Criminal History Rules

The horizontal axis, or top of the grid represents the criminal history categories. There are nine categories used to designate prior criminal history. Category A is used to categorize offenders having three (3) or more prior felony convictions designated as person crimes. Category I is used to categorize offenders having either no criminal record or a single conviction or juvenile adjudication for a misdemeanor. The criminal history categories classify an offender's criminal history in a quantitative as well as a qualitative manner. The categories between A and I reflect cumulative criminal history with an emphasis on whether prior convictions were for person crimes or nonperson crimes. Generally, person crimes are weighted more heavily than nonperson crimes. Within limits, prior convictions for person crimes will result in a harsher sentence for the current crime of conviction. See K.S.A. 21-4709.

The criminal history scale is represented in an abbreviated form on the horizontal axis of the sentencing guidelines grid for nondrug crimes and the sentencing guidelines grid for drug crimes. The relative severity of each Criminal History Category decreases from left to right on the grids, with Criminal History Category A being the most serious classification and Criminal History Category I being the least serious classification.

Criminal History Category	Descriptive Criminal History
A	The offender's criminal history includes three or more adult convictions or juvenile adjudications, in any combination, for person felonies.
B	The offender's criminal history includes two adult convictions or juvenile adjudications, in any combination, for person felonies.
C	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, and one or more adult convictions or juvenile adjudications for nonperson felonies.
D	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, but no adult conviction or juvenile adjudication for a nonperson felony.
E	The offender's criminal history includes three or more adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
F	The offender's criminal history includes two adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
G	The offender's criminal history includes one adult conviction or juvenile adjudication for a nonperson felony, but no adult conviction or juvenile adjudication for a person felony.

H	The offender's criminal history includes two or more adult convictions or juvenile adjudications for nonperson and/or select misdemeanors, and no more than two adult convictions or juvenile adjudications for person misdemeanors, but no adult conviction or juvenile adjudication for either a person or nonperson felony.
I	The offender's criminal history includes no prior record, or one adult conviction or juvenile adjudication for a person, nonperson, or a select misdemeanor, but no adult conviction or juvenile adjudication for either a person or a nonperson felony.

Criminal History Categories are based upon the following types of prior convictions and/or adjudications:

1. person felonies;
2. nonperson felonies;
3. person misdemeanors and comparable municipal ordinance and county resolution violations;
4. class A nonperson misdemeanors and comparable municipal ordinance and county resolution violations; and
5. class B nonperson select misdemeanors and comparable municipal ordinance and county resolution violations.

Convictions for “comparable municipal ordinance and county resolution violations” may only be scored for criminal history purposes for crimes committed on or after July 1, 1994, when K.S.A. 1993 Supp. 21-4710(d)(7) was amended to specifically allow for those convictions to be counted for criminal history purposes. See *State v. Dunn*, 21 Kan. App. 2d 359, 900 P.2d 245 (1995).

The “person” designation refers to crimes that inflict, or could inflict, physical or emotional harm to another person. Examples of person crimes are robbery, rape, aggravated arson, and battery. The “nonperson” designation refers generally to crimes committed that inflict, or could inflict, damage to property. Nonperson crimes also include offenses such as drug crimes, failure to appear, suspended driver's license, perjury, etc. The “select” designation refers to convictions for weapons violations.

All convictions and adjudications, except as otherwise provided, should be included in the offender's criminal history. Prior convictions or adjudications, whether sentenced concurrently or consecutively, will each be counted separately.

The following rules are applicable pursuant to K.S.A. 21-4710, in determining an offender's criminal history classification:

1. Only verified prior convictions will be considered and scored.

2. A prior conviction is any conviction, other than another count in the current case which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203 and amendments thereto, which occurred prior to imposition of sentence in the current case regardless of whether the crime that was the subject of the prior conviction was committed before or after the commission of the current crime of conviction.
3. The classification of a prior conviction will be made in accordance with the law applicable at the time of the conviction.
4. All prior adult felony convictions, including expungements, will be considered and scored.
5. There will be no decay factor applicable to adult convictions.
6. All person misdemeanor convictions, class A nonperson misdemeanor convictions, class B select nonperson misdemeanors, and comparable municipal ordinance and county resolution violations shall be considered and scored.
7. Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history.
8. Prior convictions of a crime defined by a statute that has since been repealed shall be scored using the classification assigned at the time of such conviction.
9. Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes.
10. If prior convictions of any crime operate to enhance the severity level or penalties for the current crime of conviction, elevate the current crime of conviction from a misdemeanor to a felony, or constitute elements of the present crime of conviction, those prior convictions may not be counted in the offender's criminal history. Unless otherwise provided, all other prior convictions will be considered and scored. See K.S.A. 21-4710(d)(11).

Juvenile Adjudications

11. Except as otherwise provided, a juvenile adjudication which would have been a nonperson class D or class E felony if committed before July 1, 1993, or a nondrug level 6, 7, 8, 9 or 10, or drug level 4, nonperson felony if committed on or after July 1, 1993, or a misdemeanor if committed by an adult, will decay if the current crime of conviction is committed after the offender reaches the age of 25.
12. For convictions of crimes committed before July 1, 1993, a juvenile adjudication that would constitute a class A, B or C felony, if committed by an adult, will not decay. For convictions of crimes committed on or after July 1, 1993, a juvenile adjudication which would constitute an off-grid felony, a nondrug severity level 1, 2, 3, 4 or 5 felony, or a drug severity level 1, 2 or 3 felony, if committed by an adult, will not decay.
13. All juvenile adjudications that would constitute a person felony will not decay.

Diversions

14. Diversions are not convictions and are therefore not included in criminal history with the exception of the provision of K.S.A. 2004 Supp. 8-1567(m)(1) for felony DUI.

The following information is **not** relevant to establishing an offender's criminal history classification under the KSGA. **Thus the following types of prior criminal activity should not be recorded on the Criminal History Worksheet.**

Juveniles: Do **not** include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in an adjudication.

Adults: Do **not** include traffic infractions, diversions (except DUI diversions for subsequent DUI convictions and involuntary manslaughter while driving under the influence of alcohol or drugs), contacts with law enforcement, or arrests not resulting in conviction. Prior convictions should be recorded in descending order by the date of conviction, starting with the most recent conviction .

Special Applications in Determining Criminal History

The following special rules are applicable to the determination of the offender's criminal history category.

Person Misdemeanors

Every three prior adult convictions or juvenile adjudications of class A and class B person misdemeanors in the offender's criminal history, or any combination thereof, are to be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. Convictions or adjudications for misdemeanor person crimes may place an offender in a higher criminal history category classification. For example, an offender who has five misdemeanor batteries will fall into criminal history category D, which reflects one prior person felony conviction, rather than criminal history category H, which reflects only multiple misdemeanor convictions.

In addition, every three prior adult convictions or adjudications of misdemeanor assault as defined in K.S.A. 21-3408 and amendments thereto, that occurred within a period of three years prior to the new conviction, are also to be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes.

K.S.A. 21-4711 was amended in 1999 to specify that the "period of three years" referred to in subsection (a) concerning assault, applies only to the three years commencing immediately prior to the **date of conviction** for the current crime of conviction.

Select Class B Nonperson Misdemeanors

A prior conviction for a violation of: subsection (a)(1) of K.S.A. 21-4204 and amendments thereto, criminal possession of firearms by a person who is both addicted to and an unlawful user of a controlled substance; subsection (a)(5) of K.S.A. 21-4204 and amendments thereto, possession of a firearm on school grounds; or K.S.A. 21-4218 and amendments thereto, possession of a firearm on the grounds of or in the state capitol building, is to be scored as a select class B nonperson misdemeanor conviction or adjudication. These select misdemeanors are the only nonperson class B or class C misdemeanors which are counted in the determination of the offender's criminal history category and their inclusion can only move the offender from criminal history category I to criminal history category H.

Involuntary Manslaughter and DUI

If the current crime of conviction is involuntary manslaughter while driving under the influence of alcohol or drugs, each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for: (A) An act described in K.S.A. 8-1567 and amendments thereto; or (B) a violation of a law of another state or an ordinance of any city, or resolution of any county, which prohibits the act described in K.S.A. 8-1567 and amendments thereto shall count as one person felony for criminal history purposes. See K.S.A. 2004 Supp. 21-3442 and 21-4711(c)(2).

Burglary

Prior adult convictions and juvenile adjudications for burglary will be scored for criminal history purposes as follows:

- (a) As a prior person felony if the prior conviction or adjudication was classified as a burglary to a dwelling as described in subsection (a) of K.S.A. 21-3715;
 - (b) As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary to a building other than a dwelling as described in subsection (b) of K.S.A. 21-3715; and
 - (c) As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary to a motor vehicle or other means of conveyance of persons or property as described in subsection (c) of K.S.A. 21-3715.
- (d) The facts required to classify prior adult convictions or juvenile adjudications for burglary, must be established by the State by a preponderance of the evidence.

Out-of-State Convictions

Prior out-of-state convictions and juvenile adjudications will also be used to determine the appropriate criminal history category classification. Out-of-state crimes will be classified as either felonies or misdemeanors according to the law of the convicting jurisdiction. For example, if a crime is a felony in another state, it will be counted as a felony for criminal history purposes regardless of the classification of the crime under Kansas law.

However, Kansas law will be used to classify the crime as either a person or nonperson offense. In designating a crime as person or nonperson, comparable Kansas offenses will serve as the basis for determination. See K.S.A. 2004 Supp. 21-4711(e). See also *State v. LaGrange*, 21 Kan. App. 2d 477, 901 P.2d 44 (1995), *rev. denied* 258 Kan. 861 (1995). If the state of Kansas does not have a comparable offense, the out-of-state conviction will be classified as a nonperson crime. Convictions or adjudications occurring within the federal system, other state systems, the District of Columbia, foreign, tribal, or military courts are considered out-of-state convictions or adjudications. See K.S.A. 2004 Supp. 21-4711(e).

The facts required to classify out-of-state adult convictions and juvenile adjudications such that they are considered in the determination of the offender's criminal history score must be established by the State by a preponderance of the evidence.

Juvenile Records

Subject to the decay rule, K.S.A. 21-4710 (d) (4), (5), and (6), prior juvenile adjudications will be treated in the same manner as adult convictions when determining criminal history category classification. An out-of-state juvenile adjudication will be treated as a juvenile adjudication for criminal history purposes.

The parties are entitled access to the juvenile files and records of the offender in order to discover or verify criminal history. See K.S.A. 2004 Supp. 22-3212(i).

Anticipatory Crimes

A prior conviction for an attempt, conspiracy, or solicitation to commit a crime will be treated as a person or nonperson crime in accordance with the designation of the underlying crime. See K.S.A. 2004 Supp. 21-4711(g).

Proof of Criminal History

Unless disputed by the offender, the criminal history worksheet serves as adequate verification of the offender's criminal history. If the offender disputes any aspect of the criminal history worksheet portion of the presentence investigation report as prepared by the field services officer, notice of any erroneous aspects of the worksheet must be provided to the prosecutor and the sentencing court immediately upon receipt of the worksheet by the offender. The State will then have the burden of producing further evidence to satisfy its burden of proof regarding any disputed part or parts of the criminal history. The standard of proof is proof by a preponderance of the evidence. The sentencing court must allow the state reasonable time to produce the necessary verifying evidence to meet its burden of proof as to the disputed portion of the criminal history.

Properly certified or authenticated copies of journal entries will generally satisfy the State's burden. The sentencing court may correct any errors in the criminal history worksheet. See K.S.A. 2004 Supp. 21-4714 and K.S.A. 21-4715. An offender must specify the exact nature of any alleged error if he or she objects to his or her criminal history worksheet. See K.S.A. 2004 Supp. 21-4715.

CHAPTER V: PRESENTENCE INVESTIGATION REPORTS

Requirements

The sentencing court is required to order a Presentence Investigation Report (PSI) to be prepared by a court services officer as soon as possible after every felony conviction. See K.S.A. 2004 Supp. 21-4714(a). The KSGA establishes a uniform format for the PSI in all felony cases. This format must be used to provide consistency statewide. The PSI includes a face sheet, a Criminal History Worksheet, and limited topic sections covering the current offense: official version, defendant's version, victim(s) statement(s), drug, alcohol, and psychological evaluations of the defendant, restitution amounts, and the field services officer's recommendations regarding conditions of probation where appropriate.

A copy of the PSI, the Criminal History Worksheet and the Journal Entry of Judgment, all attached together, must be sent to the Kansas Sentencing Commission concerning each felony case within thirty days after sentencing. See K.S.A. 2004 Supp. 22-3439(a). This data provides offender identification information and offense conviction information for each current crime of conviction, as well as all prior convictions. A PSI is required for all felony cases involving crimes committed on or after July 1, 1993, including all unclassified felonies. Each PSI prepared for an offender to be sentenced for one or more felonies committed on or after July 1, 1993, **must include and be limited to** the following information:

1. A summary of the factual circumstances of the crime or crimes of conviction.
2. If the offender desires to provide one, a summary of the offender's version of the crime.
3. When there is an identifiable victim, a victim report. To the extent possible, the report shall include a complete listing of restitution for damages suffered by the victim.
4. An appropriate classification of each crime of conviction on the crime severity scale.
5. A listing of prior adult felony, class A person and non-person misdemeanor, person misdemeanor, and class B select nonperson misdemeanor convictions, all comparable municipal ordinance and county resolution violations, and all comparable prior juvenile adjudications (and whether they have decayed). The report should also include an assessment of the appropriate classification of the criminal history on the criminal history scale, the source of information regarding the prior convictions listed and copies of any available documents verifying the existence of the prior convictions, including any prior criminal history worksheets prepared for sentencing proceedings for crimes occurring after July 1, 1993.

NOTE: The following information is **not** relevant to establishing an offender's criminal history classification under the KSGA. **Thus the following types of prior criminal activity should not be recorded on the Criminal History Worksheet.**

Juveniles: Do not include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in an adjudication.

Adults: Do not include traffic infractions, diversions (except DUI diversions for subsequent DUI convictions and involuntary manslaughter while driving under the influence of alcohol or drugs), contacts with law enforcement, or arrests not resulting in conviction. Prior convictions should be recorded in descending order by the date of conviction, starting with the most recent conviction.

6. A proposed grid box classification for the crime or crimes of conviction and the presumptive sentence for each.
7. If the proposed grid box classification is a grid box that presumes imprisonment, the presumptive prison term range and the presumptive duration of postrelease supervision as it relates to the crime severity scale.
8. If the proposed grid box classification does not presume prison, the presumptive prison term range and the presumptive duration of the non-prison sanction as it relates to the crime severity scale, and the court services officer's recommendations for conditions to be included as part of the non-prison sanction.
9. The presentence investigation report will become part of the court record and accessible to the public and the offender, except that the official version, offender's version, victim statement, psychological reports, and drug and alcohol reports are to be confidential. See K.S.A. 2004 Supp. 21-4714(c).
10. The criminal history worksheet will not substitute as a presentence investigation report.
11. The presentence investigation report may include psychological and drug and alcohol reports but no other additional or socio-economic information is to be included, and the report should not contain any recommendations from the preparer regarding the appropriate sentence to be imposed.
12. The sentencing court may take judicial notice of a prior presentence investigation report criminal history worksheet prepared for a previous sentencing proceeding for a crime occurring after July 1, 1993, as verification of the criminal history reflected on the worksheet. See K.S.A. 2004 Supp. 21-4714(f). See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).
13. All presentence investigation reports shall be completed on a form approved by the Kansas Sentencing Commission. See K.S.A. 2004 Supp. 21-4714(g).

A copy of the Kansas Sentencing Guidelines Act Presentence Investigation Report form and Instructions for completing the Presentence Investigation Report form is contained in Appendix D of this Manual. See Appendix D Pages 7 through 17.

CHAPTER VI: SENTENCING

Sentencing Range

Each grid box states the presumptive sentencing range, in months, for an offender whose crime of conviction and criminal history place such offender in that grid box. The middle number in the grid box is the “standard” number of months, the upper number in the grid box is the “aggravated” number of months, and the lower number in the grid box is the “mitigated” number of months. If an offense is classified in a grid box below the dispositional line, the presumptive disposition shall be nonimprisonment. If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment. See K.S.A. 2004 Supp. 21-4704.

Sentencing Options

The sentencing court is free to impose any sentence within the presumptive sentencing range. The sentencing court should select the midpoint or standard term of months in the usual case and use the upper or lower term to take into account any aggravating and mitigating factors that do not amount to sufficient justification for a departure. While the sentencing grids provide presumptive punishment for felony convictions, the sentencing court may depart from the presumptive sentence based upon substantial and compelling reasons. See K.S.A. 2004 Supp. 21-4704 and 21-4716. The sentencing court may increase the sentence up to double the duration within the grid box, lower the duration to any extent, or impose a dispositional departure when aggravating or mitigating circumstances exist which are substantial and compelling. See K.S.A. 2004 Supp. 21-4716(a), 21-4717(a) and K.S.A. 21-4719(c)(2).

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departure sentences. However, in the 2002 Legislative Session K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were both amended to correct the upward durational departure problem arising from *Gould* effective on 06/06/02. A bifurcated jury procedure is now provided for to allow the jury to determine any aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard.

Fines

Felony fines are as follows (K.S.A. 2004 Supp. 21-4503a):

Off-grid and drug severity level 1	≤ \$500,000.
Nondrug severity level 1 through 5 and drug severity level 2 and 3	≤ \$300,000.
Nondrug severity level 6 through 10 and drug severity level 4	≤ \$100,000.

The maximum penalty for a violation of the Kansas Securities Act is \$25,000 for each violation. If the violation is committed against an elderly or disabled person, in addition to any civil penalty otherwise provided by law, the administrator may impose an additional penalty not to exceed \$15,000 for each violation. The total penalty against a person shall not exceed \$1,000,000. See K.S.A. 17-12a412, 17-12a603 and 17-12a604.

Presumptive Nonimprisonment

In a presumptive nonimprisonment case, the sentencing court must pronounce the duration of the nonprison sanction and must pronounce the underlying prison sentence. See K.S.A. 2004 Supp. 21-4704(e)(3), 21-4705(d)(3) and 21-4706(b).

Period of Probation or Assignment to Community Corrections

For all crimes committed on or after July 1, 1993, lengths of probation in all felony cases are as follows (K.S.A. 2004 Supp. 21-4611):

For nondrug crimes:

Presumptive 36 months for felonies in severity levels 1 through 5;
Presumptive 24 months for felonies in severity levels 6 and 7;
Not more than 18 months for felonies on severity level 8; and
Not more than 12 months for felonies on severity levels 9 and 10.

For drug crimes:

Presumptive 36 months for felonies in severity levels 1 and 2;
Not more than 18 months for felonies on severity level 3; and
Not more than 12 months for felonies on severity level 4, except for offenders sentenced to participation in a certified drug abuse treatment program pursuant to K.S.A. 21-4729. These offenders may remain on probation for up to 18 months.

The KSGA recommends probation duration periods for crimes ranked on the nondrug grid at severity levels 1 through 7 and on the drug grid for severity levels 1 and 2. The sentencing court may set the duration of probation at their discretion up to a maximum of five (5) years or the maximum period of the prison sentence that could be imposed, whichever is longer. If the defendant is convicted of nonsupport of a child, the period may be continued as long as the responsibility for support continues. If the defendant is ordered to pay full or partial restitution, the period may be continued as long as the amount of restitution ordered has not been paid. See K.S.A. 2004 Supp. 21-4611(c)(7).

The KSGA sets upper limits on probation duration periods for sentences on severity levels 8 through 10 on the nondrug grid and severity levels 3 and 4 on the drug grid. For crimes at these severity levels, the sentencing court may impose a longer period of probation if the court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by the length of the probation terms provided in subsections (c)(3) and (c)(4) of K.S.A. 2004 Supp. 21-4611. Additionally, for these severity levels, the sentencing court may continue to extend the period of probation if the offender has been convicted of nonsupport of a child as long as the responsibility for support continues. The period of probation may also be extended as long as restitution remains unpaid. See K.S.A. 2004 Supp. 21-4611(c) (7).

The provisions of subsection (c) of K.S.A. 2000 Supp. 21-4611 shall be applied retroactively. The sentencing court should have directed that a review of all persons serving a nonprison sanction for a crime in severity levels 8, 9 or 10 of the sentencing guidelines grid for nondrug crimes or a crime in severity levels 3 or 4 of the sentencing guidelines grid for drug crimes. On or before September 1, 2000, the duration of such person's probation should have been modified in conformity with the provisions of subsection (c) of K.S.A. 2000 Supp. 21-4611.

Conditions of Probation

Court services and community corrections officers may recommend conditions of probation for offenders ordered to community placement. The maximum amount of time an offender can be incarcerated in a county jail as a condition of probation in a felony case is 60 days (with an additional maximum of 60 days in jail as a condition of a probation revocation), except for convictions for felony driving under the influence and felony domestic battery. See K.S.A. 2004 Supp. 21-4603d(a)(3) and 21-3412(c)(3). For crimes committed prior to July 1, 1999, an offender may also be sentenced to jail for more than thirty days for a conviction for deprivation of property which is a motor vehicle. See K.S.A. 2004 Supp. 21-3705(b).

K.S.A. 2000 Supp. 21-3412 was amended in 2001 and the “domestic battery” statute formerly found at K.S.A. 2000 Supp. 21-3412(c) became a separate statute, namely K.S.A. 21-3412a.

Target Population for Community Corrections (2000 Senate Bill 323)

House Substitute for Senate Bill 323 passed into law during the 2000 Kansas Legislative Session, amended K.S.A. 1999 Supp. 75-5291(a) (2) to create a definition of the target population of offenders for placement in Community Corrections programs.

The target population definition specifies that adult offenders convicted of felony offenses who meet one of the following criteria will be eligible for placement in community corrections:

1. Offenders whose sentence falls within the designated border boxes on either the drug or nondrug sentencing grids;
2. Offenders whose sentence falls within nondrug grid boxes 6-H, 6-I, 7-C, 7-D, 7-E, 7-F, 7-G, 7-H, or 7-I;
3. Offenders whose severity level and criminal history classification designate a presumptive prison sentence but receive a nonprison sentence as the result of a dispositional departure;
4. Offenders who receive a nonprison sentence and are convicted of a severity level 7 or higher sex offense as defined in K.S.A. 2004 Supp. 22-4902, regardless of the manner in which the sentence is imposed;
5. Any offender who violates conditions of release or assignment or a nonprison sanction has been established as provided in K.S.A. 22-3716 prior to revocation to a state correctional facility;
6. Any offender determined to be high risk/high needs or both by the use of a statewide mandatory standardized risk assessment tool or instrument validated for community corrections placement;
7. Any offender who successfully completes an assignment to a conservation camp program.

K.S.A. 2003 Supp. 75-5291 was amended in the 2004 legislative session to add subsection (g) to the list of offenders eligible for placement in community corrections. Subsection (g) adds offenders who have been sentenced to community corrections supervision pursuant to K.S.A. 21-4729. K.S.A. 2004 Supp. 75-5291(a) (4) allows the placement of juvenile offenders in community corrections programs if the local community corrections advisory board approves. However, grants from the community corrections fund administered by the Secretary of Corrections cannot be used for this service. K.S.A. 2004 Supp. 75-

5291(a)(5) contains a public safety provision that allows direct placement to prison if the sentencing court sets forth with particularity why placement in community corrections would jeopardize public safety or would not be in the best interest of the offender.

Target Population for Community Corrections (2003 Senate Bill 123)

Senate Bill 123 passed into law during the 2003 Kansas Legislative Session, amended K.S.A. 2002 Supp. 21-4603d to create a definition of the target population of offenders for placement in certified drug abuse treatment programs under community corrections supervision.

The target population definition specifies that **adult** offenders convicted of K.S.A. 65-4160 or 65-4162 and who meet one of the following criteria shall be required to participate in a certified drug abuse treatment program:

1. Offenders in the 4-E, 4-F, 4-G, 4-H or 4-I grids boxes of the drug grid, who have no prior conviction(s) of: K.S.A. 65-4142 (the unlawful acts involving proceeds derived from violations of the uniform substances control act statute); 65-4159 (the unlawful manufacturing or attempting such of any controlled substance statute); 65-4161 (unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants statute); 65-4163 (the unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances statute); or 65-4164 (the unlawful acts relating to certain narcotic drugs statute), or any similar offense from another jurisdiction.
2. Offenders in the 4-A, 4-B, 4-C, or 4-D grids boxes of the drug grid, who have no prior conviction(s) of: K.S.A. 65-4142 (the unlawful acts involving proceeds derived from violations of the uniform substances control act statute); 65-4159 (the unlawful manufacturing or attempting such of any controlled substance statute); 65-4161 (unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants statute); 65-4163 (the unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances statute); or 65-4164 (the unlawful acts relating to certain narcotic drugs statute), or any similar offense from another jurisdiction. However, the offender's prior person felony conviction(s) must have only been severity level 8, 9, or 10 or nongrid offenses and the sentencing court must find and set forth with particularity, the reasons for finding that public safety will not be jeopardized by placement of the offender in a certified drug abuse treatment program.
3. Offenders whose offense is classified in the 4-E or 4-F drug grid boxes but do not qualify for the certified drug treatment program, must be considered for the Labette Correctional Conservation Camp before a sentencing court may impose a dispositional departure. This must also be done for an offender prior to the revocation of a nonprison sanction for an offender whose offense is classified in the 4-E or 4-F drug grid boxes but does not qualify for the certified drug treatment program.
4. The Secretary of Corrections may also make direct placement to Labette for offenders whose offense is classified in the 4-E or 4-F drug grid boxes if those offenders do not otherwise meet the requirements of K.S.A. 21-4729.

Presumptive Imprisonment

In presumptive imprisonment cases, the sentencing court must pronounce the prison sentence, the maximum potential good time reduction to such sentence and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision will not negate the period of postrelease supervision. See K.S.A. 2004 Supp. 21-4704(e)(2) and 21-4705(d)(2).

Good Time

The prison sentence represents the time an offender actually serves, subject to a maximum reduction of 20% good time for crimes committed prior to April 20, 1995, and 15% for crimes committed on or after that date. See K.S.A. 2004 Supp. 21-4706(a) and 21-4722(a)(2). Any reduction in the prison sentence due to good time must be added to the postrelease supervision period to be served after the prison sentence is completed. See K.S.A. 2004 Supp. 22-3717.

Border Boxes

If an offense is classified in grid blocks 5-H, 5-I or 6-G of the nondrug grid, or grid blocks 3-E, 3-F, 3-G, 3-H or 3-I of the drug grid, the sentence is presumed imprisonment, but the court may impose an optional nonprison sentence upon making the following findings on the record:

1. An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism;
2. A recommended treatment program is available and the offender can be admitted to the program within a reasonable period of time; or
3. A nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. See K.S.A. 2004 Supp. 21-4704(f)(1), (2) and (3), and also 21-4705(d)(1),(2) and (3).

Special Applications in Sentencing

Person Felonies Committed With a Firearm

When a firearm is used in the commission of a person felony, the offender's sentence shall be presumed imprisonment. The sentencing court may nevertheless impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. See K.S.A. 2004 Supp. 21-4704(h).

Aggravated Assault/Aggravated Battery Against a Law Enforcement Officer

The sentence for a conviction under K.S.A 21-3411 (aggravated assault of a law enforcement officer) or K.S.A 2004 Supp. 21-3415 (aggravated battery against a law enforcement officer), which places the offender's sentence in grid blocks 6-H or 6-I is presumed imprisonment. The sentencing court may nevertheless impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any

decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. See K.S.A. 2004 Supp. 21-4704(g).

Crime Committed for the Benefit of a Criminal Street Gang

Where it is shown at sentencing that the offender committed any felony violation for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members, the sentence shall be presumed imprisonment. The sentencing court may nevertheless impose an optional nonprison sentence and such nonprison sentence is not considered a departure and is not subject to appeal. See K.S.A. 2004 Supp. 21-4704(k).

Persistent Sex Offender

The sentence for any persistent sex offender whose current crime of conviction carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term. The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term. However, the provisions of this subsection shall not apply to any person whose current convicted crime is a severity level 1 or 2 felony, except for offenders whose current conviction is rape (K.S.A. 21-3502) and the offender has at least one prior conviction for rape in this state or a comparable felony from another state. K.S.A. 2004 Supp. 21-4704(j). K.S.A. 2004 Supp. 21-4704(j) also defines the term “persistent sex offender.”

Note: A prior conviction upon which a defendant has been classified as a persistent sex offender may not be used in determining that defendant’s criminal history category. *State v. Taylor*, 27 Kan. App. 2d 62, 998 P.2d 123 (2000), affirmed *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).

Examples

An offender’s current crime of conviction is sexual exploitation of a child (K.S.A. 21-3516). The offender has one prior conviction of indecent solicitation of a child (K.S.A. 21-3510). The offender’s prior conviction will be used to determine the offender’s status as a “persistent sex offender” and will not be used in calculating the offender’s criminal history category. Therefore, the offender will have a criminal history score of 5-I (doubled) if the offender has no other criminal convictions.

An offender’s current conviction is indecent liberties with a child (K.S.A. 21-3503). The offender has two prior convictions of indecent solicitation of a child (K.S.A. 21-3510). One prior conviction of indecent solicitation of a child will be used to determine the offender’s statute as a “persistent sex offender” and the other conviction will be used in calculating the offender’s criminal history score. Therefore, the offender will have a criminal history score of 5-D (doubled) if the offender has no other person/nonperson felony convictions.

Felony DUI

Felony driving under the influence as defined in K.S.A. 2004 Supp. 8-1567 is a non-grid crime with no guidelines severity level or other connection to the KSGA. Instead, the specific sentencing provisions of the DUI statute determine the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. See K.S.A. 2004 Supp. 21-4704(i).

K.S.A. 2000 Supp. 8-1567 was amended in the 2001 Legislative Session and as a result, it is possible for an offender convicted of a fourth or subsequent DUI to serve time in the KDOC in the event he or she violates conditions of postrelease supervision. See K.S.A. 2004 Supp. 8-1567(g).

Felony Domestic Battery

Felony domestic battery, as defined in K.S.A. 2004 Supp. 21-3412a, is a non-grid person felony with no guidelines severity level or other connection to the KSGA. The specific sentencing provision of the domestic battery statute determines the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. See K.S.A. 2004 Supp. 21-4704(i). K.S.A. 2000 Supp. 21-3412 was amended in the 2001 Legislative Session and felony domestic battery became a separate statute, namely K.S.A. 21-3412a.

New Felony Committed While the Offender is Incarcerated and Serving a Sentence for a Felony, or While the Offender is on Probation, Assignment to Community Corrections, Parole, Conditional Release, or Postrelease Supervision for a Felony

Under any of these conditions, the sentencing court may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime does not constitute a departure. See K.S.A. 2004 Supp. 21-4603d(f) and also *State v. Allen*, 28 Kan. App. 2d 784, 20 P.3d 747 (2001).

New Felony Committed While the Offender is on Release for a Felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated

Under this condition the sentencing court may sentence an offender to imprisonment for a new conviction, even if the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime committed while on release for a felony does not constitute a departure. See K.S.A. 2004 Supp. 21-4603d(f).

Kansas Securities Act

Any violation of the Kansas Securities Act, K.S.A. 17-12a101 *et seq.*, resulting in a loss of \$25,000 or more, shall have a presumptive sentence of imprisonment regardless of the offender's presumptive sentence as located on the nondrug grid. See K.S.A. 17-12a508.

Extended Jurisdiction Juvenile Imposed

Under K.S.A. 38-16,126(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment must be completed for these cases.*

Second or Subsequent Conviction for Manufacture of a Controlled Substance

The sentence for a second or subsequent conviction for the manufacture of a controlled substance under K.S.A. 2004 Supp. 65-4159, is a drug grid severity level 1 offense and the sentencing court is required to double the presumptive sentence length. *However, the sentencing court may reduce the sentence in an amount not to exceed 50 percent of the special sentence length increase if mitigating circumstances exist.* Any decision made by the sentencing court regarding the reduction is not considered a departure and is not subject to appeal. See K.S.A. 2004 Supp. 21-4705(e).

Burglary of a Residence Committed When the Offender has a Prior Conviction for Burglary of a Residence or Non-Residence, or a Prior Conviction for Aggravated Burglary

The sentence for the violation of subsection (a) of K.S.A. 21-3715 and amendments thereto (burglary of a residence) when the offender has a prior conviction for the burglary of a residence or non-residence, or an aggravated burglary (K.S.A. 21-3716), shall be presumed imprisonment. See K.S.A. 2004 Supp. 21-4704(l).

Second or Subsequent Conviction for Forgery

The sentence for a second conviction for forgery under K.S.A. 2004 Supp. 21-3710, will be a nondrug grid severity level 8, nonperson offense and the offender will be required to serve at least 30 days imprisonment as a condition of probation, and fined the lesser of the amount of the forged instrument or \$1,000. The sentence for a third or subsequent conviction for forgery will be a nondrug grid severity level 8, nonperson offense and the offender will be required to serve at least 45 days imprisonment as a condition of probation, and fined the lesser of the amount of the forged instrument or \$2,500. See K.S.A. 2004 Supp. 21-3710(b)(3) and (b)(4).

Mandatory Drug Treatment

K.S.A. 21-4729 (2003 Senate Bill 123) was passed during the 2003 Legislative Session and established a nonprison sanction of certified drug abuse treatment for a target population of adult offenders convicted of K.S.A. 65-4160 or 65-4162. These offenders shall be supervised by community corrections. Mandatory participation in a certified drug abuse treatment program is required for the target population of adult offenders convicted of K.S.A. 65-4160 or 65-4162 with offense dates on or after November 1, 2003. See *State v. De la Cerda*, ___ Kan. ___, 109 P.3d 1248 (No. 91,963, filed 4/22/05) (The effective date of the statutory changes to K.S.A. 2003 Supp. 65-4160 is November 1, 2003).

Authorized Dispositions

Whenever any person has been convicted of a crime, several options or a combination of these options are available to the sentencing court. In felony cases that fall within the presumptive nonprison category on the grid, the court may:

1. Assign supervision to Court Services or Community Corrections pursuant to K.S.A. 2004 Supp.75-5291.
2. Impose a jail term of not more than 60 days.
3. Impose a fine that may be paid in installments.

4. Order restitution, however, the court order must specify the amount to be paid. When imposing restitution as a condition of probation, the court must specify the name of the victim or agency that is to be paid in the court order.
5. Assign to a conservation camp for a period not to exceed 180 days as a condition of the probation. Successful completion of the conservation camp program must be followed by 180 days in a community corrections program.
6. Order house arrest.
7. Order submission to and completion of an alcohol and drug evaluation.
8. Order attendance and satisfactory completion of an alcohol or drug education or training program.
9. Order the defendant to pay the administrative fee authorized by K.S.A. 2004 Supp. 22-4529 and amendments thereto, unless waived by the court;
10. Order the defendant to pay a domestic violence special program fee authorized by K.S.A. 2004 Supp. 20-369, and amendments thereto;

See K.S.A. 2004 Supp. 21-4603d

In felony cases that fall within the presumptive imprisonment category, the sentencing court may:

1. Imprison the offender, however, the sentence imposed must consist of an imprisonment term and a postrelease supervision term.
2. Impose a fine that may be paid in installments.
3. Order restitution, however, the court order must specify the amount to be paid. When imposing restitution as a condition of postrelease supervision, the sentencing court must specify the name of the victim or agency that is to be paid in the court order.

See K.S.A. 2004 Supp. 21-4603d

Procedure Prior to the Imposition of a Dispositional Departure, or Before Imposing a Prison Sentence When Revoking a Nonprison Sanction

Prior to imposing a dispositional departure for an offender whose offense is classified in the presumptive nonprison grid block of either sentencing guidelines grid; prior to sentencing an offender to incarceration whose offense is classified in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, or in grid blocks 3-E, 3-F, 3-G, 3-H, 4-E or 4-F of the sentencing guidelines grid for drug crimes; or prior to revocation of a nonprison sanction of an offender whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid, or grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, or in grid blocks 3-E, 3-F, 3-G, 3-H, 3-I, 4-E or 4-F of the sentencing guidelines grid for drug crimes; the sentencing court **shall** consider placement of the offender in the Labette Correctional Conservation Camp, conservation camps established by the Secretary of Corrections pursuant to K.S.A. 2004 Supp. 75-52,127 and amendments thereto, or a community intermediate sanction center.

Pursuant to K.S.A. 2004 Supp. 21-4603d (g) a defendant shall **not** be sentenced to imprisonment if space is available in a conservation camp or a community intermediate sanction center and the offender meets all the conservation camp's or a community intermediate sanction center's placement criteria, *unless the sentencing court states on the record the reasons for not placing the offender in a conservation camp or a community intermediate sanction center.* See K.S.A. 2004 Supp. 21-4603d (g) and 75-5291(a)(4).

Revocation of Nonprison Sanction of Certified Drug Abuse Treatment(K.S.A. 2004 Supp. 21-4729)

If the offender fails to participate in or has a pattern of intentional conduct that demonstrates the offender's refusal to comply with or participate in the treatment program, **as established by judicial finding** or is convicted of a new felony, other than a felony conviction of K.S.A. 65-4160 or 65-4162, the offender shall be subject to revocation of probation and shall serve the underlying prison sentence as established in K.S.A. 21-4705, and amendments thereto. Upon completion of the underlying prison sentence, the offender shall not be subject to a period of postrelease supervision. The amount of time spent participating in such program shall not be credited as time against the underlying prison sentence. (This includes time spent in residential treatment). See K.S.A. 2004 Supp. 21-4705 and 21-4603d (n).

Multiple Convictions

In situations where the offender is being sentenced for multiple convictions, the sentencing court, in its discretion, may sentence consecutively or concurrently. *The sentencing court must state on the record whether the sentence is to be served concurrently or consecutively.* See K.S.A. 2004 Supp. 21-4720(b). If the sentencing court is silent as to whether multiple sentences are to run consecutively or concurrently, the sentences shall run concurrently, except as provided by K.S.A. 21-4608(c), (d) and (e)(1) and (2).

Concurrent and Consecutive Sentences; Limitations

Consecutive sentencing is generally required pursuant to K.S.A. 21-4608, when imposing:

1. A sentence for a felony committed while the offender was on probation, assigned to a community corrections services program, on parole, conditional release, postrelease supervision, or serving time for a felony; or
2. A sentence for a felony committed while the offender was on felony bond.

In all sentencing cases involving multiple convictions, the sentencing court must establish the base sentence for the primary crime. The primary crime is the crime with the highest severity ranking. The base sentence is determined by the severity level of the primary crime and the offender's total criminal history score. The grid box where the severity level of the primary crime and the total criminal history score intersect is the presumed sentence in months. All additional convictions (non-base convictions) shall be determined by the severity level of that offense scored at criminal history category I. The sentencing court should then determine whether to run the base and nonbase sentences concurrently or consecutively. See K.S.A. 2004 Supp. 21-4720(b)(2), (b)(3) and (b)(5).

When consecutive sentences are imposed for multiple convictions in one case stemming from multiple counts brought in one charging instrument, the total controlling sentence cannot exceed twice the base sentence. However, it is not necessary to reduce the duration of any of the nonbase sentences in order to satisfy this rule, because the limit applies only to the total controlling sentence. See K.S.A. 2004 Supp. 21-4720(b)(4). The sentencing court is not required to shorten the length of any of the individual nonbase sentences given to an offender, so long as the court orders that the total sentence given to the offender (see the “**Grand Total Months of Confinement Imposed – (SUM OF DOC, County Jail [nongrid**

offenses], or Underlying Prison Term) at Section VI of the KSGA Journal Entry of Judgment form is adjusted so that it does not exceed twice the base sentence.

The postrelease supervision period will be the longest supervision period imposed for any of the multiple convictions, including the lifetime supervision period carried by a life sentence imposed for an off-grid crime. Even in the case of consecutive prison sentences, postrelease supervision periods will not be aggregated. In addition, in cases of multiple nonprison sentences, even if the underlying prison sentences are ordered to run consecutively, the nonprison terms shall not be aggregated or served consecutively. However, if the nonprison term is revoked the offender will serve the prison terms consecutively. See K.S.A. 2004 Supp. 21-4720(b)(4), (b)(7) and (b)(8).

Determining the Primary Crime

A presumptive imprisonment crime is primary over a presumptive nonimprisonment crime. When an offender is sentenced for multiple convictions of crimes carrying both presumptive prison and nonprison sentences, if the sentence for the primary crime is prison, the entire imprisonment term of consecutive sentences, will be served in prison. See K.S.A. 2004 Supp. 21-4720(b)(6).

When the offender is convicted of crimes sentenced on both the nondrug and drug grids, the primary crime is the one that carries the longest prison term. When the offender is convicted of both an off-grid crime and a crime for which the sentence is located on a sentencing guidelines grid, the off-grid crime shall not be used as the primary crime in determining the base sentence when imposing multiple sentences. If the two sentences are ordered to run consecutively, the offender shall not begin to serve the sentencing guidelines grid sentence until paroled from the off-grid sentence and the postrelease period will be based on the off-grid crime. See K.S.A. 2004 Supp. 21-4720(b)(2).

Crimes Committed While the Offender is Imprisoned

If an offender is sentenced to prison for a crime committed on or after July 1, 1993, while the offender was imprisoned for an offense committed prior to July 1, 1993, and the offender is not eligible for the retroactive application of the KSGA, the new sentence begins when the offender is paroled or reaches the conditional release date on the old sentence, whichever is earlier. If the offender was past the offender's conditional release date at the time the new offense was committed, the new sentence begins when the offender is ordered released by the Kansas Parole Board or reaches the maximum sentence date on the old sentence, whichever is earlier. The new sentence is then served as otherwise provided by law. The period of postrelease supervision will be based on the new sentence. See K.S.A. 21-4608(e)(2).

Effective July 1, 2000, a new departure factor was added for cases sentenced under the nondrug or drug grids allowing for upward departures in cases where a new crime was committed while the offender was incarcerated. See K.S.A. 2004 Supp. 21-4716.

Departure Factors

Either party may file a motion seeking a departure, or the sentencing court may depart on its own motion. Any party filing a motion to depart must state the type of departure sought and the reasons relied upon. The parties are entitled to notice that the sentencing court is considering a departure, stating the type of departure intended by the court, and the reasons and factors relied upon. Both the prosecution and defense shall have a reasonable time to prepare for a departure hearing, and the sentencing court shall transmit to both parties, copies of the presentence investigation report prior to the hearing. The State must provide notice of a departure hearing to any victim or the victim's family, and the sentencing court shall review the victim impact statement. Parties may brief the sentencing court in writing and make oral arguments to the court at the hearing. See K.S.A. 2004 Supp. 21-4718(a)(1) and (a)(3).

Upward durational departure sentencing was affected by *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), where K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face.” In the 2002 Legislative Session both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to provide for a procedure that allows the jury to determine all of the aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. Facts that would increase the penalty beyond the statutory maximum must now be submitted to a jury. See K.S.A. 2004 Supp. 21-4716(b). A County or District Attorney seeking an upward durational departure must provide notice 30 days prior to the date of trial or within 5 days from the date of the arraignment, if the trial is to take place in less than 30 days from the date of the arraignment. See K.S.A. 2004 Supp. 21-4718(b)(1). The court shall determine if the presentation of the evidence regarding the aggravating factors shall be presented during the trial of the matter or in a jury proceeding following the trial. See K.S.A. 2004 Supp. 21-4718(b)(2). The determination of the aggravating factors shall be by a unanimous jury vote, on a special jury verdict form and based on the reasonable doubt standard. See K.S.A. 2004 Supp. 21-4718(b)(4) and (b)(7).

At the conclusion of the departure hearing or within 20 days thereafter, the sentencing court shall issue findings of fact and conclusions of law regarding the issues submitted by the parties. See K.S.A. 2004 Supp. 21-4718(a)(2). Whenever the sentencing court departs from the presumptive guidelines sentence, the court must make findings of fact as to the reasons for departure regardless of whether a hearing is requested. See K.S.A. 2004 Supp. 21-4718(a)(4). If a factual aspect of the current crime of conviction is an element of the crime or is used to subclassify the crime on the crime severity scale, that factual aspect may not be used as an aggravating or mitigating factor to justify a departure from the presumptive sentence, unless the criminal conduct constituting that aspect of the current conviction is significantly different from the usual criminal conduct captured by that aspect of the crime. See K.S.A. 2004 Supp. 21-4716(c) (3).

In determining aggravating or mitigating circumstances, the sentencing court may consider any evidence received during the proceeding, including the victim impact statement, the presentence investigation report, written briefs and oral arguments of either the State or counsel for the offender, and any other evidence relevant to such mitigating or aggravating circumstances that the court finds trustworthy and reliable. See K.S.A. 2004 Supp. 21-4716(c)(1)(A) through (E) and (c)(2)(A) through (G).

Mitigating Factors **K.S.A. 2004 Supp. 21-4716 (c)(1)(A) through (E)**

The following nonexclusive list of statutorily enumerated mitigating factors may be considered in determining whether substantial and compelling reasons for a downward dispositional departure exist:

1. The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction.
2. The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor is not sufficient as a complete defense.
3. The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor.
4. The offender, or the offender's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

5. The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.

Aggravating Factors

K.S.A. 2004 Supp. 21-4716(c)(2)(A) through (G).

The following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:

1. The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity that was known or should have been known to the offender.
2. The offender's conduct during the commission of the current offense manifested excessive brutality to the victim in a manner not normally present in that offense.
3. The offense was motivated by the offender's belief *or perception*, entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim, whether or not the offender's belief *or perception* was correct. See K.S.A. 2004 Supp. 21-4716(c)(2)(C).
4. The offense involved a fiduciary relationship that existed between the offender and the victim.
5. The offender, 18 or more years of age, employed, hired, used, persuaded, induced, enticed, or coerced any individual under 16 years of age to commit or assist in avoiding detection or apprehension for commission of any person felony or any attempt, conspiracy or solicitation to commit any person felony regardless of whether the offender knew the age of the individual under 16 years of age.
6. The offender's current crime of conviction is a crime of extreme sexual violence and the offender is a predatory sex offender as defined by this section.
7. The offender was incarcerated at the time the crime was committed.

The 2002 Legislative Session amendments to K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 became effective upon publication on June 6, 2002. The amendment to K.S.A. 2001 Supp. 21-4716 included the addition of an offender's *perception* of the victim's race, color, religion, ethnicity, national origin or sexual orientation. As the result, an offender's *perception* regarding the victim's background and not just the offender's *belief* of the same, now applies. In other words an offender's *perception*, versus just his or her *belief* of a victim's background, is no longer a defense.

Additional Aggravating Factors for Drug Grid

K.S.A. 2004 Supp. 21-4717(a)

In addition to the factors listed above, the following aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist for felonies sentenced on the drug grid:

1. The offender, 18 or more years of age, employed, hired, used, persuaded, induced, enticed, or coerced any individual under 16 years of age to commit or assist in avoiding detection or apprehension for commission of any violation of the uniform controlled substances act, or any attempt, conspiracy or solicitation to commit a violation of the uniform controlled substances act, regardless of whether the defendant knew the age of the individual was under 16 years of age.

2. The offender possessed illegal drugs:
 - a. With the intent to sell, which were sold or were offered for sale to a person under 18 years of age; or
 - b. With the intent to sell, deliver or distribute, or which were sold, or offered for sale in the immediate presence of a person under 18 years of age.
3. The crime was committed as part of a major organized drug manufacture, production, cultivation or delivery activity. *Two or more of the following nonexclusive factors constitute evidence of major organized drug manufacture, production, cultivation or delivery activity:*
 - a. The offender derived a substantial amount of money or asset ownership from the illegal drug sale activity.
 - b. The presence of a substantial quantity or variety of weapons or explosives at the scene of arrest or associated with the illegal drug activity.
 - c. The presence of drug transaction records or customer lists that indicate a drug sale activity of major size.
 - d. The presence of manufacturing or distribution materials such as, but not limited to, drug recipes, precursor chemicals, laboratory equipment, lighting, irrigation systems, ventilation, power-generation, scales or packaging material.
 - e. Building acquisitions or building modifications including but not limited to painting, wiring, plumbing or lighting which advanced or facilitated the commission of the offense.
 - f. Possession of large amounts of illegal drugs, or substantial quantities of controlled substances.
 - g. A showing that the offender has engaged in repeated criminal acts associated with the manufacture, production, cultivation or delivery of controlled substances.
 - h. The offender was incarcerated at the time the crime was committed.

Sex Offenders Postrelease Supervision Departure

The sentencing court may depart from the normal postrelease supervision period to a period of up to 60 months if it is found that the primary crime of conviction is sexually violent or sexually motivated and the court states on the record substantial and compelling reasons to impose a departure. See K.S.A. 2004 Supp. 22-3717(d)(1)(D)(i) and (ii). The sentencing court may order a psychological evaluation and completion of a treatment program by the offender. See K.S.A. 2004 Supp. 22-3717(d)(1)(D)(iv).

Durational and Dispositional Departures

When imposing a departure sentence, the sentencing court should begin with the grid box corresponding to the severity level of the crime of conviction and the offender's criminal history. A sentence that is an upward durational departure cannot exceed twice the maximum presumptive sentence. There is no limit on a downward durational departure. The sentencing court may also depart from the presumptive disposition in the case by sentencing an offender for whom the presumptive sentence is

probation to prison (upward dispositional departure), or by sentencing an offender for whom the presumptive sentence is prison to a nonprison sanction (downward dispositional departure). See K.S.A. 21-4719.

When a prison term is imposed as an upward dispositional departure and is also combined with an upward durational departure, the sentencing court must define separate substantial and compelling reasons for both the durational and the dispositional departure. See K.S.A. 21-4719(c)(2). However, this requirement does not apply in the case of a downward dispositional and durational departure combination.

Departure and Consecutive Sentencing Combination

If the sentencing court finds substantial and compelling reasons to impose an upward durational departure sentence for one of the individual crimes in a case involving multiple convictions, the court may also depart from the presumptive limits on consecutive sentences. The imprisonment term of the departure sentence must also remain within the limit of double the maximum presumptive sentence for that offense. The total prison term of the consecutive sentences must also remain within the limit of double the base sentence including the departure sentence. See K.S.A. 2004 Supp. 21-4720(c)(2) and (c)(3).

Example

An offender is convicted of kidnapping (severity level 3), aggravated burglary (severity level 5) and theft with a loss of at least \$1,000 but less than \$25,000 (severity level 9). The offender has one prior person felony conviction placing him in criminal history Category D. If the jury determines, based on the reasonable doubt standard, that substantial and compelling reasons exist to impose an upward durational departure sentence for the kidnapping, that departure may be imposed in conjunction with the imposition of consecutive sentences for the remaining convictions of aggravated burglary and theft. Both the limits on the total consecutive term and the limits applicable to upward durational departure sentences apply.

The sentencing court begins by establishing a base sentence for the primary sentence. In this fact pattern, the most serious crime of conviction is the kidnapping, with a presumed imprisonment sentence of 94 months, which becomes the base sentence. The two remaining convictions at criminal history Category I have presumptive sentences of 32 and 6 months respectively. (If the sentencing court wished only to sentence these offenses consecutively, the total sentence could not aggregate to a sum greater than two times the base without a durational departure sentence. In this hypothetical case, the greatest aggregate consecutive sentence would be 2×94 , or 188 months. Here, the total sum of $94 + 32 + 6$ would be 132 months, a consecutive sentence clearly within the limit of twice the base sentence.)

Assume that the jury establishes a finding for an upward durational departure sentence for the kidnapping conviction based on the presence of an aggravating factor and the court imposes three consecutive sentences for the three offenses in this case.

Base sentence: Kidnapping @ Maximum Presumptive Sentence = 100 months
(Kidnapping at severity level 3, criminal history “D” on the nondrug grid)
Other sentences: Aggravated Burglary and Theft = 32 and 6 months.
(Aggravated Burglary at severity level 5, criminal history “I” and
Theft at severity level 9, criminal history “I” on the nondrug grid)

The base sentence may be enhanced to a maximum departure length of up to 200 months, or two times the maximum presumptive sentence. This is the standard rule for any departure sentence. In addition, the total imprisonment term of the consecutive sentences, including the departure term, shall not

exceed twice the departure of the enhanced sentence. Therefore, the aggregate consecutive sentence in this example cannot exceed 2×200 , or 400 months. The sum of $200 + 32 + 6$, or 238 months is well within the limit of 400 months.

The sentencing court may choose to depart and impose a longer sentence for the aggravated burglary and theft if independent substantial and compelling reasons exist to justify those departures. The aggregate consecutive sentence becomes $200 + 64 + 12$, or 276 months, which is still within the limit of 400 months. This sentence would represent a durational departure sentence within a consecutive sentence context, and the limits on the total duration of such a sentence are sometimes referred to as the "double-double rule." The application of the so-called "double-double" rule allows a sentencing court considerable discretion in fashioning a sentence for exceptional cases that warrant both an upward durational departure and consecutive sentencing.

Reporting Dispositions to the Kansas Bureau of Investigation and the Kansas Sentencing Commission

The sentencing guidelines Journal Entry of Judgment form approved by the Kansas Sentencing Commission must be completed for each felony conviction for a crime committed on or after July 1, 1993. A signed copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 21-4714 and criminal history worksheet must be forwarded to the Kansas Sentencing Commission **within 30 days of final disposition**. See K.S.A. 2004 Supp. 22-3439(a).

Misdemeanor dispositional information must be forwarded to the Kansas Bureau of Investigation central repository within 30 days of final disposition. Municipal Courts must ensure that information concerning convictions of city ordinance violations comparable to convictions for class A and B misdemeanors under Kansas criminal statutes are forwarded to the Kansas Bureau of Investigation central repository. This information must be transmitted on a form or in a format approved by the Kansas Attorney General within 30 days of final disposition. See K.S.A. 2004 Supp. 12-4106(e).

All revocation of probation Journal Entries must be on a form approved by the Kansas Sentencing Commission (i.e., the Journal Entry of Probation Revocation Hearing) and must be sent to the Kansas Sentencing Commission within **30 days of final disposition**. See K.S.A. 2004 Supp. 22-3426a(c) and 22-3439(b). Even if the probation revocation hearing does not result in imprisonment, a Journal Entry of Probation Revocation Hearing, on the approved form, must be submitted to the Kansas Sentencing Commission and the Kansas Bureau of Investigation. Additionally, all class A and B misdemeanor crimes and assault as defined in K.S.A. 21-3408 must also be forwarded to the Kansas Bureau of Investigation central repository. See K.S.A. 2004 Supp. 22-3439(c).

The Kansas Sentencing Commission staff will review felony Journal Entries for possible illegal sentences. The staff will promptly notify the sentencing court in writing when a possible illegal sentence has been identified. The information gathered from the sentencing guidelines forms provides a database to assess the impact of the sentencing guidelines on state correctional resources, the impact of proposed revisions to the sentencing guidelines, and improves the availability and reliability of criminal history record information.

CHAPTER VII: APPEALS

Appellate Review Principles

Sentences within the presumptive range in the appropriate grid boxes are generally not appealable. Plea agreements accepted by the sentencing court are also not subject to appellate review. Appellate review of the sentencing court's criminal history determination is limited to errors of inclusion or exclusion of prior convictions or juvenile adjudications. The appellate court may also review errors in crime severity level determinations. Appellate review is otherwise limited to claims of partiality, prejudice, oppression, or corrupt motive in cases in which a departure sentence was imposed. See K.S.A. 21-4721.

The appropriate appellate review standard for a departure sentence is whether there are substantial and compelling reasons for the departure. The findings of fact and reasons justifying departure must be on the record and supported by evidence. Substantial and compelling reasons for departure are intended to be factors outside the normal range of circumstances for the crime committed. After an appeal is filed from a departure sentence, either the sentencing court or the appellate court may determine the offender's custody status during the time prior to the sentence review. See K.S.A. 22-3604.

CHAPTER VIII: COMMUNITY SANCTIONS AND POSTRELEASE SUPERVISION

Postrelease Supervision

Upon completion of the prison portion of the imposed sentence, most inmates will be released to serve a term of postrelease supervision, plus the amount of good time earned and retained while imprisoned. Under the terms of House Substitute for Senate Bill 323, passed into law during the 2000 Kansas Legislative Session and effective May 25, 2000, for crimes committed on or after July 1, 1993, and sentenced under the KSGA, postrelease supervision is:

- 36 months for felonies classified in severity levels 1 through 4 on the nondrug grid and felonies classified in severity levels 1 and 2 on the drug grid;
- 24 months for felonies classified in severity levels 5 and 6 on the nondrug grid and felonies classified in severity level 3 on the drug grid;
- 12 months for felonies classified in severity levels 7 through 10 on the nondrug grid and felonies classified in severity level 4 of the drug grid except for some K.S.A. 65-4160 or 65-4162 offenses committed on or after November 1, 2003.

Offenders convicted of severity levels 1 through 6 on the nondrug grid and severity levels 1 through 3 of the drug grid may have their period of postrelease supervision reduced up to 12 months based on the offender's performance under supervision. Offenders convicted of severity levels 7 through 10 of the nondrug grid and severity level 4 of the drug grid may have their period of postrelease supervision reduced up to six (6) months based on the offender's performance under supervision. See K.S.A. 2004 Supp. 22-3717.

However, under the language found at K.S.A. 1993 Supp. 22-3717, for crimes committed prior to April 20, 1995, postrelease supervision lengths for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, were for a period of 24 months. Despite the retroactive application of the changes made to postrelease supervision periods under K.S.A. 22-3717 in the 2000 Kansas Legislative Session, it appears that offenders sentenced under the sentencing guidelines for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, for crimes committed prior to April 20, 1995, will continue to receive the postrelease supervision periods applicable for those crimes at the time the crimes were committed.

The crime carrying the longest postrelease supervision term will determine the period of supervision for offenders ordered to serve more than one sentence, whether concurrent or consecutive. See K.S.A. 2004 Supp. 22-3717(d)(1)(F). If an offender is convicted of a sexually motivated crime or sexually violent crime, as defined in K.S.A. 2004 Supp. 22-3717(d)(1)(F)(2)(A) through (L), the sentencing court based upon substantial and compelling reasons stated on the record, may depart from the prescribed postrelease supervision period and place the offender on postrelease supervision for a maximum period of 60 months. This is considered a departure and is appealable by either the State or the offender. The Kansas Parole Board may grant early discharge from this extended postrelease supervision period upon completion of any treatment programs and completion of the longest presumptive postrelease supervision period associated with any of the crimes for which the prison sentence was being served. Early discharge is at the discretion of the Parole Board.

Offenders convicted of crimes deemed “sexually violent or sexually motivated” must register with local law enforcement agencies. See K.S.A. 2004 Supp. 22-3717(d)(1)(D)(vii).

The Parole Board will continue to review release plans. However, the Board will be unable to make any changes regarding release dates for offenders sentenced under the KSGA. An offender's inability to complete a specific program will not inhibit the offender's release from prison to postrelease supervision. Incomplete program agreement plan components may be continued to the postrelease supervision period.

Violations of Conditions of Release; Probation or Postrelease Supervision

Probation

When an offender is sentenced for a felony committed while the offender was on felony probation (or other felony nonprison status), a consecutive sentence generally is mandated, and the sentencing court may sentence the offender to prison for the new offense even if that offense otherwise presumes a nonprison sentence. This is not considered a departure and does not require additional substantial and compelling circumstances on the record. See K.S.A. 2004 Supp. 22-3716(b).

Postrelease Supervision

For crimes committed before April 20, 1995, a finding of a technical violation of the conditions of postrelease supervision will result in imprisonment for a period not to exceed 90 days from the date of the final revocation hearing; for crimes committed on or after April 20, 1995, a technical violation will result in imprisonment of 180 days, which may be reduced by up to 90 days based upon the performance of the inmate. If an offender is returned to prison with a new misdemeanor or felony conviction but no new prison sentence, upon revocation of postrelease supervision, the offender will serve the entire remaining balance of the postrelease supervision period in prison, including the amount of good time which had been earned before release. See K.S.A. 2004 Supp. 75-5217.

Conversion of Sentence for a Crime Committed After July 1, 1993, but Before March 24, 1994

If an offender is sentenced to prison for a felony committed after July 1, 1993, but before March 24, 1994, while on parole or conditional release for a felony committed prior to July 1, 1993, the old sentence shall be converted into a determinate sentence and will run consecutive to the new sentence as follows:

1. Twelve months for class C, D or E felonies or the conditional release date whichever is shorter; and
2. Thirty-six months for class A or B felonies or the conditional release date whichever is shorter.

The converted sentence for crimes committed prior to July 1, 1993, will be aggregated with the new consecutive guidelines sentence. See K.S.A. 1994 Supp. 22-3717(f)(1) and (2).

Conversion of Sentence for a Crime Committed After March 24, 1994

If an offender is sentenced to prison for a crime committed on or after March 24, 1994, while on probation, parole, conditional release or in a community corrections program for a crime committed prior to July 1, 1993, and the offender is not eligible for retroactivity under K.S.A. 21-4724, the new sentence will not be aggregated with the old sentence. Instead, the offender will not begin to serve the new sentence until he or she is paroled, or reaches the conditional release date on the old sentence.

If the offender was past the conditional release date at the time the new offense was committed, the new sentence shall begin when the offender is ordered released by the Kansas Parole Board or reaches the maximum expiration date of the old sentence, whichever is earlier. Only at that point will the offender begin to serve the new sentence, which will also govern the postrelease supervision term. However, if the old sentence was life or an indeterminate term with life as the maximum, the offender will remain under supervision for life, or until discharged by the Parole Board. See K.S.A. 2004 Supp. 22-3717 (f).

CHAPTER IX: RETROACTIVITY

Retroactive Application of Sentencing Guidelines.

The retroactive provision of the KSGA applies to offenders incarcerated who would have been considered presumptive probation candidates had they been sentenced as if their crimes occurred on or after July 1, 1993, or who would have been placed in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, had they been sentenced as if their crimes occurred on or after July 1, 1993. See K.S.A. 21-4724(b)(1). For offenders sentenced before July 1, 1993, the Kansas Department of Corrections (KDOC) was required to assess each offender's possible eligibility for retroactive application of the KSGA by determining the severity level of the crime(s) of conviction as if the crime(s) had occurred on or after July 1, 1993, and the offender's criminal history. Once an offender was determined to be eligible for the retroactive application of the sentencing guidelines, the KDOC was to issue a report to that effect to the offender, prosecutor, and the sentencing court. The parties had 30 days in which to request a hearing to challenge the KDOC's determination of the crime severity or the criminal history, or to seek a departure sentence if the offender is eligible for conversion of the sentence to a guidelines sentence.

If no hearing was requested, the sentence was converted and the offender was released after serving the midpoint sentence of the range in the applicable sentencing guidelines grid box. If a hearing is requested, the sentencing court determined whether the offender is eligible for conversion to a guidelines sentence and the appropriate duration of that sentence, within the limits imposed by the sentencing guidelines. The sentencing court has the power to convert the sentence to a guidelines sentence that is a durational departure based on circumstances that existed at the time of the original sentencing. The presence of the offender in person at the hearing was not required but counsel had to be appointed. No sentence could be increased through retroactive application of the guidelines. See K.S.A. 21-4724(a) through (e).

For those offenders who committed crimes prior to July 1, 1993, but who were sentenced after that date, the sentencing court was to impose a sentence pursuant to the law in effect before July 1, 1993. However, the sentencing court was also required to compute the appropriate sentence had the offender been sentenced pursuant to the KSGA. See K.S.A. 21-4724(f). The offender could challenge the compiled criminal history prior to sentencing. The KDOC could also use this information to determine eligibility for retroactive application of the sentencing guidelines. In addition, a sentencing court should take judicial notice of these documents in a subsequent hearing. See K.S.A. 2004 Supp. 21-4714(f). See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

K.S.A. 21-4724(b)(1) contains a provision concerning the modification of sentences for individuals convicted of pre-July 1, 1993, crimes that, had the crime been committed after July 1, 1993, would have been classified in grid blocks 3-H, or 3-I of the drug grid. K.S.A. 21-4724(b)(1) provides that such drug grid 3-H or 3-I crimes may be converted to KSGA determinate sentences “*pursuant to the provisions of subsection (c) of K.S.A. 21-4705, and amendments thereto.*”

This provision created the commonly referred to “small sale” exception for marijuana which allowed for the conversion of sentences equivalent to 3-H or 3-I drug grid sentences for only those individuals who fit within the “small sale” of marijuana definition that was found at K.S.A. 21-4705(c). See *State v. Hackler*, 21 Kan. App. 2d 325, 900 P.2d 241 (1995). However, the changes made in K.S.A. 1996 Supp. 21-4705 eliminated the definition of a “small sale” of marijuana exception from subsection (c)

of the statute, and thus effectively eliminated the possibility of having a pre-guidelines conviction that would equate to a 3-H or 3-I drug grid conviction converted to a determinate sentence.

2000 Retroactivity Provisions

Legislation passed during the 2000 Kansas Legislative Session and found at Chapter 182, Section 6, 2000 Session Laws, or at K.S.A. 2000 Supp. 21-4611(d), also contained provisions with retroactive application for sentences under the Kansas Sentencing Guidelines Act. For a full description of those provisions, please see the **“TIMELINE OF CERTAIN IMPORTANT EVENTS RELATED TO THE KSGA”** section of this Manual.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE SENTENCING COURT

Crime severity and criminal history are the main factors which control sentencing decisions

The KSGA provides invaluable guidance to the sentencing court in the form of a rational sentencing structure based on two controlling factors: the crime severity level and the criminal history of the offender. The drug and nondrug sentencing grids reflect the sentences that are presumed to be appropriate in the vast majority of cases when these two factors are taken into consideration to determine whether the offender should be sent to prison and for what length of time.

Sentences imposed are actually served

The terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA are of a pre-established, binding duration. In other words, the offender will actually serve the sentence imposed by the sentencing court. The offender may earn good time in an amount no greater than 15 or 20% (depending on when the crime occurred) of the sentence, thereby reducing the portion of the sentence that must be served in prison, but that amount of good time will then be added to the period of postrelease supervision, so that the entirety of the term will not be affected or reduced.

Guidelines provide objectivity but leave room for properly justified exercise of discretion

The KSGA offers an objective approach to sentencing without placing undue limitations on the discretion of the sentencing court. The guidelines establish presumptive rather than mandatory sentences. Upon motion of either party or upon its own motion, the sentencing court may depart from the presumed disposition established by the guidelines. The sentencing court may similarly depart upward or downward from the presumptively appropriate duration of any prison term established by the sentencing guidelines. Such departures must be supported on the record by substantial and compelling reasons, which may include aggravating or mitigating circumstances specifically enumerated in non-exclusive lists of departure factors found within the sentencing guidelines provisions.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departure sentences. Both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to correct the upward durational departure problem arising from *Gould* effective and this change became effective on June 6, 2002. The jury will now determine all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. The presentation of the evidence will be presented during the trial of the matter or in a bifurcated jury proceeding following the trial.

Certain offenses (i.e., those that fall into border boxes on the guidelines grids) allow the sentencing court the option to impose a nonprison sentence without making a departure. However, the sentencing court also has the discretion to decide whether sentences should run concurrently, or consecutively and this authority allows imposition of a sentence up to twice the maximum presumptive term of imprisonment if substantial and compelling reasons for the departure are adequately stated on the record. See K.S.A. 2004 Supp. 21-4720.

Forms help make a record

In order to assist the sentencing court in making a complete record of all aspects of the sentencing proceedings, the Journal Entry of Judgment form approved by the Kansas Sentencing Commission facilitates inclusion of all requisite information and findings for the record in a concise and efficient manner. Under statute, each KSGA Journal Entry of Judgment must be on a form approved by the Kansas Sentencing Commission. See K.S.A. 2004 Supp. 22-3426. This form must be used for all felony cases sentenced on or after July 1, 1993. In addition, the sentencing court must forward a copy of the Journal Entry of Judgment, attached together with the Presentence Investigation Report to the Kansas Sentencing Commission within thirty (30) days of the sentencing. See K.S.A. 2004 Supp. 22-3439(a).

Each Journal Entry of Probation Revocation Hearing must be on a form approved by the Kansas Sentencing Commission and must be sent to the Kansas Sentencing Commission within 30 days of final disposition. See K.S.A. 2004 Supp. 22-3426a(c) and 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing on the approved form, must still be submitted to the Kansas Sentencing Commission. Information for felony probation revocations based upon crimes committed on or after July 1, 1993 (and all class A and class B misdemeanor crimes and assault as defined in K.S.A. 21-3408, committed on or after July 1, 1993), must also be forwarded to the Kansas Bureau of Investigation central repository within 30 days of final disposition. See K.S.A. 2004 Supp. 22-3439(c).

Court not bound by plea agreements

The sentencing court remains free to accept or reject any plea agreement reached by the parties that is otherwise authorized by the KSGA. While plea bargaining may not be used to exact a promise from the prosecutor not to allege prior convictions that will enhance the crime severity level of the offense, or will affect the determination of the offender's criminal history category, plea bargaining is otherwise permissible.

The offender may enter a plea to the charged offense, or to a lesser or related charge in return for the dismissal of other charges or counts, a recommendation for a particular sentence within the appropriate sentencing range on the grid, a recommendation for a departure sentence where departure factors exist and are stated on the record, an agreement that a particular charge or count will or will not be filed, or any other promise. See K.S.A. 21-4707(b)(4) and K.S.A. 2004 Supp. 21-4713(f).

Informing the offender of the possible penalties when accepting a guilty or nolo contendere plea

Whether the sentencing court accepts or rejects any proposed plea agreement, the court will often be making a decision whether to accept a plea of guilty or no contest from the offender before coming into possession of all criminal history information that is required for imposition of sentence. Nevertheless, the sentencing court is still able to advise the offender of the sentencing consequences of the plea by simply informing the offender of the entire range of sentences provided by the grid for the severity level of the crime to which the plea is being entered. See K.S.A. 21-4707 and K.S.A. 2004 Supp. 22-3210(a)(2).

While subsequently discovered prior convictions cannot then be used to enhance the severity level of the crime to which a plea has been accepted, they can be counted in the offender's criminal history. See K.S.A. 21-4707(c)(4).

Presentence Investigation Report is mandatory

Another benefit of the KSGA for the sentencing court is the fact that a Presentence Investigation Report is mandatory, which ensures that the court will be in possession of the most complete criminal history information involving the offender as is available. See K.S.A. 2004 Supp. 21-4714(a).

Challenges to criminal history; other hearings

If the offender does not agree in open court to the criminal history as reflected in the Criminal History Worksheet/Presentence Investigation Report and gives written notice of any errors contained there, the prosecutor will have to prove the disputed elements by a preponderance of the evidence at the hearing, and the sentencing court is authorized to give the prosecution reasonable time to produce such evidence. The offender must specify the exact nature of any alleged error if he/she objects to his/her criminal history worksheet. See K.S.A. 2004 Supp. 21-4715(c).

If any party seeks imposition of a departure sentence, a hearing on the matter must be held, and the parties must be given adequate time to prepare and present their arguments regarding the proposed departure. Written arguments may be submitted and oral arguments presented, and the sentencing court must review any victim impact statement. Copies of the Presentence Investigation Report must be provided to the parties prior to the hearing. The sentencing court will have up to twenty (20) days to rule. See K.S.A. 2004 Supp. 21-4718(a)(2). Any departure from the presumptive sentence must be supported by substantial and compelling reasons stated on the record. See K.S.A. 2004 Supp. 21-4716(a), 21-4717(a), 21-4720(c)(1) and K.S.A. 21-4719(c)(2).

Appeals

Any sentence imposed by the sentencing court which is within the presumptive sentencing range provided for the crime on the proper grid, or which results from a plea agreement between the parties and is approved by the sentencing court on the record, is generally not appealable unless the determination of the severity level of the crime, or the criminal history of the offender are brought into question. A departure sentence is appealable to the extent that the reasons justifying the departure must be found to be supported by the evidence in the record and are substantial and compelling. Otherwise, review of departure sentences on appeal is limited to claims that the sentence resulted from partiality, prejudice, oppression, or corrupt motive. See K.S.A. 21-4721.

Extended jurisdiction juvenile cases

Under K.S.A. 38-16,126(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment form must be completed for these cases.* A box is located in the “Special Rule Applicable” section of the adult Journal Entry of Judgment form labeled “Extended Jurisdiction Juvenile Imposed,” to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed.

SUGGESTED SENTENCING PROTOCOL UNDER THE KSGA

1. ANNOUNCE THE CASE.

2. HAVE COUNSEL STATE THEIR APPEARANCES FOR THE RECORD.

3. GIVE AN OVERVIEW OF HOW THE DEFENDANT WAS FOUND GUILTY.

- A. Specify whether a plea agreement was involved, any of the charges were dismissed and whether the case involved a bench trial or a trial by jury.

4. HAVE THE PARTIES BOTH ACKNOWLEDGE RECEIPT OF THE PRESENTENCE INVESTIGATION REPORT (PSI).

5. ASK BOTH PARTIES IF THEY HAVE CHALLENGES TO THE CRIMINAL HISTORY.

- A. Require the parties to answer on the record.
- B. Address the defendant personally and ask whether he or she admits the criminal history set out in the Criminal History Worksheet. See K.S.A. 2004 Supp. 21-4715.
- C. If challenges to the criminal history exist, take up each challenge and rule on each challenge. The offender must specify the exact nature of any alleged error if he or she objects to his or her criminal history worksheet.
 - 1. Criminal history shall be established by a preponderance of the evidence. The burden of proof is on the State.
 - 2. A certified or authenticated copy of a Journal Entry is sufficient proof of a prior offense unless the defendant denies he or she is the person named. See *State v. Staven*, 19 Kan. App. 2d 916, 881 P.2d 573 (1994).
 - 3. If time to challenge the criminal history was not available prior to the sentencing hearing, additional time must be provided. See *State v. Hankins*, 19 Kan. App. 2d 1036, 880 P.2d 271 (1994).
- D. If changes are made to the defendant's criminal history, the court should also make the actual changes on the Criminal History Worksheet.
- E. If the defendant's criminal history score changes due to a revision, the court should offer counsel a continuance to file a departure request or other presentence preparation required by the change (s).

6. ANNOUNCE THE CRIMINAL HISTORY SCORE.

7. ASK THE PARTIES IF THERE IS ANY LEGAL REASON WHY SENTENCE SHOULD NOT BE PRONOUNCED AT THIS TIME.

8. IF REQUESTS FOR DEPARTURE HAVE BEEN FILED, EXPLAIN TO COUNSEL HOW YOU WILL HANDLE THE DEPARTURE HEARING.

- A. There was no prescribed proceeding for a departure hearing under K.S.A. 2004 Supp. 21-4718.
- B. A departure hearing may be conducted as a separate hearing, or the motion may be heard preceding other oral arguments and evidence on sentencing.
- C. If a separate departure hearing is held, the court may rule on the departure at the end of the hearing, “or within 20 days thereafter.” See K.S.A. 2004 Supp. 21-4718(a)(2).

9. IF NO REQUESTS FOR DEPARTURE ARE ON FILE, ASK THE PARTIES WHETHER EITHER IS SEEKING A DEPARTURE.

- A. This is not required by statute but it is the safest practice. In the event the PSI is not available in a timely manner, or other reasons arise which do not allow adequate time to prepare and present arguments regarding the issues of “departure sentencing,” a continuance must be granted. See K.S.A. 2004 Supp. 21-4718(a)(1).

10. IF A DEPARTURE IS SOUGHT, CONDUCT A HEARING ON THE DEPARTURE MOTION (S). ALLOW COUNSEL TO ADDRESS THE COURT AND ALSO ALLOW WITNESSES FOR EITHER PARTY TO TESTIFY.

- A. Sentencing for an upward durational departure was affected by *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), where K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face.” Facts that would increase the penalty beyond the statutory maximum must now be submitted to a jury. See K.S.A. 2004 Supp. 21-4716(b).
- B. A County or District Attorney seeking an upward durational departure must provide notice 30 days prior to the date of trial or within 5 days from the date of the arraignment, if the trial is to take place in less than 30 days from the date of the arraignment. See K.S.A. 2004 Supp. 21-4718(b)(1).
- C. The court shall determine if the presentation of the evidence regarding the aggravating factors shall be presented during the trial of the matter or in the jury proceeding following the trial. See K.S.A. 2004 Supp. 21-4718(b)(2).
- D. The determination of the aggravating factors shall be by a unanimous jury vote, on a special jury verdict form and based beyond the reasonable doubt standard. See K.S.A. 2004 Supp. 21-4718(b)(4) and (b)(7).

11. ASK IF ANY VICTIMS OR OTHERS WISH TO SPEAK.

- A. Following the rule in *State v. Parks*, 265 Kan. 644, 962 P.2d 486 (1998), non-victims and non-family members may also be permitted to submit written statements and/or speak.

12. ADDRESS THE DEFENDANT DIRECTLY (NOT HIS OR HER COUNSEL) AND CONDUCT ALLOCUTION.

- A. Ask the defendant personally if he or she wishes to make a statement or to present evidence in support of mitigation of sentence. Allow any statements or evidence.

13. ANNOUNCE THE BASE SENTENCE FROM THE APPROPRIATE GRID.

- A. "I hereby establish Count ___ as the base sentence. For the offense of _____, a severity level ___ (person or nonperson) ___ (drug or nondrug) felony, on which the defendant has a criminal history score of ___, thus placing him/her in grid box _____. I hereby sentence the defendant to a term of ___ months in the custody of the Secretary of Corrections. On this sentence the defendant may earn up to ___ months of good time credit and would be subject to ___ months of post-release supervision." If a fine is to be imposed, also announce the fine and the reasons for the fine. See K.S.A. 21-4607.

14. ANNOUNCE ANY DEPARTURES FROM THE BASE SENTENCE AND THE REASONS FOR THE DEPARTURE (S).

- A. Statutory mitigation and aggravation factors may be found at K.S.A. 2004 Supp. 21-4716 (nondrug) and K.S.A. 2004 Supp. 21-4717 (drug).
- B. Sentencing courts must provide separate reasons based upon facts in the record, for any/every durational and dispositional departure. See *State v. Favela*, 259 Kan. 215, 911 P.2d 792 (1996).
- C. Reasons for departure must be "substantial and compelling." See K.S.A. 2004 Supp. 21-4716(a), 21-4717(a) and K.S.A. 21-4719(c)(2). If the court is imposing a durational postrelease supervision departure under K.S.A. 2004 Supp. 22-3717(d), specifically state on the record the substantial and compelling reasons relied upon to impose a departure. See *State v. Anthony*, 273 Kan. 726 45 P.3d 852 (2002).
- D. Findings of fact as to the reasons for departure shall be made regardless of whether a hearing was requested. See K.S.A. 2004 Supp. 21-4718(a)(4).
- E. For sex offenders, a post-release supervision period of up to 60 months may be required. See K.S.A. 2004 Supp. 22-3717(d)(1)(D)(i). However, in imposing a durational postrelease supervision departure under K.S.A. 2004 Supp. 22-3717(d), state specifically on the record the substantial and compelling reasons to impose a departure. See *State v. Anthony*, 273 Kan. 726, 45 P.3d 852 (2002).

15. IF A SPECIAL RULE APPLIES WHICH DOES NOT REQUIRE A DEPARTURE, STATE THE APPLICABLE RULE AND ITS EFFECT UPON THE SENTENCE IMPOSED.

Special Sentencing Rules

K.S.A. 2004 Supp. 17-1253(f)(1)	A violation resulting in a loss of \$25,000 or more.
K.S.A. 2004 Supp. 17-1254(f)(1)	A violation resulting in a loss of \$25,000 or more.
K.S.A. 2004 Supp. 17-1255(b)(1)	A violation resulting in a loss of \$25,000 or more.
K.S.A. 17-12a508 (a)(5)	Any violation of the Kansas Securities Act, K.S.A. 17-12a101 <i>et seq.</i> , resulting in a loss of \$25,000 or more.
K.S.A. 2004 Supp. 21-3412a (b)(3)	A third or subsequent domestic battery within 5 years.
K.S.A. 2004 Supp. 21-3710(b)(3)	A second forgery conviction.
K.S.A. 2004 Supp. 21-3710(b)(4)	A third or subsequent forgery conviction.
K.S.A. 2004 Supp. 21-4603d(f)	A new crime committed while incarcerated for a felony or while on probation, assignment to a community correctional services program, parole, conditional release, or postrelease supervision for a felony.
K.S.A. 2004 Supp. 21-4603d(f)	A new felony committed while on felony bond.
K.S.A. 2004 Supp. 21-4729	Offenders sentenced for a violation of K.S.A. 2004 Supp. 65-4160 or 65-4162 on or after November 1, 2003, who are defined as the target population for mandatory drug treatment.
K.S.A. 21-4608(b) through (e)	Consecutive sentences required.
K.S.A. 2004 Supp. 21-4704(g)	An aggravated battery/assault on a LEO.
K.S.A. 2004 Supp. 21-4704(h)	The use of a firearm in a felony.
K.S.A. 2004 Supp. 21-4704(i)	A third or a fourth or subsequent DUI, or a third or subsequent domestic battery within five years.
K.S.A. 2004 Supp. 21-4704(j)	A <u>persistent</u> sex offender.
K.S.A. 2004 Supp. 21-4704(k)	A felony for the benefit of a criminal street gang.
K.S.A. 2004 Supp. 21-4704(l)	A residential burglary after a prior residential or a non-residential burglary or an aggravated burglary.
K.S.A. 2004 Supp. 21-4705(e)	A second or subsequent manufacture, or the attempted manufacture of a controlled substance.

K.S.A. 2004 Supp. 21-4705(f)	A <u>third or subsequent</u> possession of a controlled substance in violation of K.S.A. 2004 Supp. 65-4160 or 65-4162.
K.S.A. 2004 Supp. 21-4716(c)(2)(F)	Current crime of extreme sexual violence and the offender is a <u>predatory</u> sex offender.
K.S.A. 38-1636	Extended jurisdiction juvenile cases.
K.S.A. 2004 Supp. 9-2203	A Second or subsequent conviction in violation of K.S.A. 9-2203.

16. IF A DURATIONAL DEPARTURE IS GRANTED, THE TOTAL LENGTH OF THE DEPARTURE SENTENCE CANNOT EXCEED TWICE THE BASE SENTENCE.

See K.S.A. 2004 Supp. 21-4720(b)(4).

17. ANNOUNCE ALL OTHER SENTENCES AND WHETHER EACH SENTENCE IS CONCURRENT OR CONSECUTIVE TO THE BASE SENTENCE.

See K.S.A. 2004 Supp. 4720(b).

- A. The Court *must state on the record* if the sentence is concurrent or consecutive, otherwise it becomes a concurrent sentence by default except as provided by K.S.A. 21-4608(c)(d) and (e). See K.S.A. 2004 Supp. 21-4720(b).
- B. The total length of all consecutive sentences imposed cannot exceed twice the base sentence. The “Double-Double” Rule is found at K.S.A. 2003 Supp. 21-4720(b)(4) and was discussed and applied in *State v. Peterson*, 22 Kan. App. 2d 576, 920 P.2d 463 (1996).
- C. Only the primary crime will have the full criminal history applied. Non-base crimes will have a criminal history score of “I” applied, regardless of whether they are to run concurrently or consecutively. See *State v. Bowen*, 20 Kan. App. 2d 576, 890 P.2d 374 (1995).

18. ANNOUNCE WHETHER PROBATION OR COMMUNITY CORRECTIONS PLACEMENT IS GRANTED. IF DEPARTING FROM A PRESUMPTIVE DISPOSITION, STATE THE REASONS ON THE RECORD. ANNOUNCE THE CONDITIONS AND THE DURATION OF PROBATION.

In the event the offender is sentenced for a first or second violation of K.S.A. 2004 Supp. 65-4160 or 65-4162, and the offender is eligible for certified drug abuse treatment under K.S.A. 21-4729 (2003 Senate Bill 123), the offender should be informed on the record that under the provisions K.S.A. 21-4729: certified drug abuse treatment may last for a period of up to 18 months; the offender may be responsible for repayment of the costs of treatment which will be determined by the sentencing court after an assessment by community corrections; if the offender is unsuccessfully discharged or voluntarily quits the mandatory treatment, the offender would be subject to the entire underlying prison sentence with no jail time credit for time spent in treatment; every condition violation shall be subject to some form of nonprison sanctions (i.e., county jail time, fines, community service, intensified treatment, house arrest, electronic monitoring, etc.); absent a judicial finding, condition violations alone will not result in

discharge from treatment; and upon the successful completion of a certified drug abuse treatment program the offender will be discharged and not subject to postrelease supervision.

19. ESTABLISH RESTITUTION AMOUNTS, IF ANY. SCHEDULE A RESTITUTION HEARING IF THIS IS IN DISPUTE.

20. ESTABLISH THE NUMBER OF DAYS OF JAIL TIME CREDIT TO WHICH THE DEFENDANT IS ENTITLED AND THE DEFENDANT'S "SENTENCE BEGINS DATE."

See K.S.A. 2004 Supp. 21-4614 and K.S.A. 21-4614a.

21. ADVISE THE DEFENDANT THAT HE OR SHE MAY HAVE RIGHTS OF EXPUNGEMENT UNDER K.S.A. 2004 Supp. 21-4619.

22. IF THE CASE WAS TRIED, OR IF YOU HAVE RULED ADVERSELY TO THE DEFENDANT AT THE HEARING, ADVISE THE DEFENDANT OF HIS OR HER RIGHT TO APPEAL UNDER K.S.A. 21-4721.

23. ADVISE THE DEFENDANT OF THE OBLIGATION TO REGISTER AS A SEX OFFENDER, IF APPLICABLE.

See K.S.A. 2004 Supp. 22-4905(b)(1) and (b)(2)(A).

24. ADVISE THE DEFENDANT OF THE PROHIBITIONS AGAINST A CONVICTED FELON POSSESSING A FIREARM, IF APPLICABLE.

See K.S.A. 2004 Supp. 21-4204(a)(2) through (a)(4).

25. ADVISE THE OFFENDER OF THE LOSS OF CERTAIN CIVIL RIGHTS SUCH AS THE RIGHT TO VOTE UNTIL THE OFFENDER'S SENTENCE IS FULLY DISCHARGED.

See K.S.A. 2004 Supp. 21-4603, 21-4603d and 21-4615. Anyone convicted of a felony on or after 07/01/02 may not vote until his or her "sentence" is completed. This specifically includes a sentence of probation.

26. IF IMPRISONMENT IS ORDERED, REMAND THE DEFENDANT TO THE CUSTODY OF THE SHERIFF, OR ESTABLISH A DATE TO REPORT IF A STAY OF EXECUTION IS GRANTED AND IF THE DEFENDANT IS NOT IN CUSTODY. ESTABLISH AN APPEAL BOND AMOUNT, IF REQUESTED. IF PROBATION AND/OR COMMUNITY CORRECTIONS IS GRANTED, DIRECT THE DEFENDANT AS TO WHEN AND HOW TO REPORT TO THOSE AGENCIES.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE PROSECUTION

Emphasis of guidelines is on criminal history and crime severity

The KSGA places the emphasis of the sentencing phase of a criminal prosecution on the two factors that are generally of greatest concern to the prosecutor, the criminal history of the offender and the crime severity. The prosecution can focus its efforts on establishing by a preponderance of the evidence any challenged aspect (s) of the criminal history information provided in the presentence investigation report and presenting to the sentencing court any aggravating or mitigating circumstances which may provide substantial and compelling reasons for the court to consider imposing a departure sentence. Properly authenticated copies of Journal Entries of convictions or the mandatory presentence investigation reports prepared in conjunction with the prosecution of cases for crimes occurring on or after July 1, 1993, generally will be sufficient. Other properly authenticated documents that may be of use in proving criminal history include plea transcripts and charging documents such as an information, complaint, or indictment. The prosecution is entitled to reasonable time to obtain the necessary proof of prior convictions. See K.S.A. 2004 Supp. 21-4715.

Plea agreements

The prosecution may enter into plea negotiations and agreements with the offender, although there are some limitations on the type of agreement that can be reached. An agreement by the prosecutor not to allege prior convictions that will enhance the crime severity level or will affect the criminal history of the offender is **impermissible**. However, the prosecutor may agree to a dismissal of some charges or counts in return for a plea by the offender to the charged offense or to a lesser or related charge. The prosecution may also agree to file or not to file a particular charge or count, to make a recommendation for a particular sentence within the appropriate sentencing range on the grid, or to make a recommendation for a departure sentence where substantial and compelling departure factors exist and are stated on the record. See K.S.A. 21-4713.

Departure hearings

The prosecution may file a motion alleging that substantial and compelling aggravating circumstances exist which call for a more severe sanction than the presumptively appropriate sentence provided by the guidelines. If the grid establishes a presumptive nonprison sentence for the crime of conviction, the prosecution may seek a dispositional departure in the form of a prison sentence. If the grid establishes a presumptive prison sentence within the range of time provided within the appropriate grid box, the prosecution may seek an upward durational departure in the form of a longer prison sentence. The prosecution is also free to seek a downward dispositional or durational departure based on the existence of substantial and compelling mitigating circumstances. The KSGA contains non-exclusive lists of aggravating and mitigating circumstances on which motions for departures can be based. See K.S.A. 2004 Supp. 21-4716 and 21-4717.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departures. However, both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to correct the upward durational departure problem arising from *Gould* and became effective on June 6, 2002. The jury will now determine all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard.

Written and/or oral arguments may be presented to the sentencing court in support of any motion by the prosecution for a departure from the presumptive guidelines sentence or in response to any such motion by the offender when the matter of the proposed departure is set for hearing. The prosecution will have the duty to notify the victim(s) or their families of any departure hearings. See K.S.A. 2004 Supp. 21-4718, 21-4720 and K.S.A. 21-4719.

Definite terms of sentence imposed

In addition, because the terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of specific duration, the prosecutor will be able to inform the victim(s) and their families about the amount of time the offender will serve in definite terms.

Using the Journal Entry of Judgment form to assist the court in making a proper record

The prosecution can also help the sentencing court to make a complete record of all phases of the sentencing proceedings, which are required by the guidelines through use of the Journal Entry of Judgment form approved by the Kansas Sentencing Commission. The use of the Journal Entry form is mandated by the KSGA and it provides guidance in conducting the sentencing process by including all essential information and findings on the record. See K.S.A. 2004 Supp. 22-3426. This form must be used for all felony cases sentenced on or after July 1, 1997. In addition, the court must forward a copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 2004 Supp. 21-4714, to the Kansas Sentencing Commission within 30 days of sentencing. See K.S.A. 2004 Supp. 22-3439.

All revocation of probation Journal Entries must be on a form approved by the Kansas Sentencing Commission (i.e., the Journal Entry of Probation Revocation Hearing) and must be sent to the Kansas Sentencing Commission within 30 days of final disposition. See K.S.A. 2004 Supp. 22-3426a(c). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, on the approved form, must still be submitted to the Kansas Sentencing Commission. Information for felony probation revocations, which do not result in imprisonment in the KDOC, must be forwarded to the Kansas Bureau of Investigation central repository within 30 days of final disposition.

Appeals

The prosecution may appeal when the sentencing court imposes a sentence that constitutes an unfavorable departure. If the sentencing court imposes a nonprison sentence that constitutes a departure because the guidelines establish a presumption for a prison sentence for the crime of conviction, this dispositional departure may be appealed by the prosecution. If the sentencing court imposes a prison sentence of shorter duration than the presumptive term provided by the guidelines for the crime of conviction, this durational departure may also be appealed by the prosecution. See K.S.A. 21-4721.

Extended jurisdiction juvenile cases

Under K.S.A. 38-16,126(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment must be completed for these cases.* A box is located in the “Special Rule Applicable to Sentence, If Any” section of the adult Journal Entry of Judgment form labeled “Extended Jurisdiction Juvenile Imposed,” to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE DEFENSE

Importance of accurate, verified criminal history

Because the KSGA focuses so heavily on the criminal history of the offender as a determining factor of the sentence that will be imposed, the defense will be provided with a copy of the mandatory presentence investigation report, including the criminal history worksheet and an opportunity to challenge any errors contained in the report. Immediately upon receipt of the report, the defense may file written notice to the prosecution and the sentencing court alleging errors in the proposed criminal history worksheet. The burden will then fall to the State to verify and establish by a preponderance of the evidence the accuracy of any disputed portions of the alleged criminal history, and the sentencing court is authorized to correct any errors. Consequently, the defense has an important role in ensuring that the sentence is based on an accurate criminal history that has been properly verified. See K.S.A. 2004 Supp. 21-4715.

In addition, because a sentencing court may take judicial notice of a prior criminal history worksheet as an accurate reflection of criminal history for use in a subsequent case, the offender may waive the right to challenge any errors contained in the worksheet by failing to do so when the worksheet is initially prepared and served on the parties. Failure to challenge any errors in the criminal history worksheet at a hearing on the proposed conversion of a sentence for a crime committed prior to July 1, 1993, to a KSGA sentence pursuant to the retroactivity provisions of the guidelines may also operate as a waiver of that opportunity in future cases. See K.S.A. 2004 Supp. 21-4714. See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

Plea agreements

Plea bargaining remains available as a tool for use by defense counsel, subject to certain limitations. The KSGA **prohibits** the use of plea bargaining which involves a promise from the prosecutor not to allege prior convictions that may operate to enhance the crime severity level or are included in the offender's criminal history. However, the offender may enter a plea to the charged offense or to a lesser or related charge in return for the dismissal of other charges or counts. The offender may also obtain from the prosecution a promise to recommend a particular sentence within the appropriate sentencing range on the grid. In addition, the offender is free to secure a promise from the State to recommend a departure sentence favorable to the offender where mitigating departure factors exist. An agreement that a particular charge or count will or will not be filed, or any other promise not explicitly precluded by the KSGA, is permissible. However, the sentencing court will not be bound by any plea agreement proposed by the parties. See K.S.A. 21-4713.

Can seek dispositional or durational departure on behalf of offender

The offender may file a written motion alleging the existence of substantial and compelling mitigating circumstances that support the imposition of a less severe sanction than that provided by the KSGA for the crime of conviction. When the guidelines call for a prison sentence, the offender may move the sentencing court to impose a nonprison sentence as a dispositional departure. When the guidelines call for a prison sentence within the range of time provided by the appropriate grid box, the offender may move the sentencing court to impose a shorter prison sentence as a downward durational departure. See K.S.A. 2004 Supp. 21-4716, 21-4717, 21-4718, 21-4720 and K.S.A. 21-4719.

The offender may also be given the opportunity to offer written and/or oral arguments at the hearing on a motion for a departure favorable to the offender or in opposition to any unfavorable departures that may be proposed by the prosecution or the sentencing court on its own motion.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departures. However, both K.S.A. 2002 Supp. 21-4716 and K.S.A. 2002 Supp. 21-4718 were amended to correct the upward durational departure problem arising from *Gould* and became effective on June 6, 2002. The jury will now determine all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard.

Can advise the offender about time to be served in definite terms

Because the terms of imprisonment, nonprison sentences and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of definite duration, defense counsel will be able to advise the offender of the exact amount of time which the sentence will require the offender to serve once the criminal history is known.

Appeals

The offender may appeal a sentence that constitutes a departure unfavorable to the offender. The imposition of a prison sentence where the guidelines provide a presumptive nonprison sentence is an appealable dispositional departure. The imposition of a prison sentence of greater duration than the guidelines presume is an appealable durational departure. A departure sentence is appealable on the grounds that substantial and compelling reasons justifying the departure are not supported by the record.

Appellate review of departure sentences imposed pursuant to the guidelines is otherwise limited to claims of partiality, prejudice, oppression, or corrupt motive, or claims challenging the crime severity ranking or the criminal history. See K.S.A. 21-4721.

Extended jurisdiction juvenile cases

Under K.S.A. 38-16,126(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment must be completed for these cases.* A box is located in the “Special Rule Applicable to Sentence, If Any” section of the adult Journal Entry of Judgment form labeled “Extended Jurisdiction Juvenile Imposed,” to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR FIELD SERVICES OFFICERS

Preparation of the Presentence Investigation Report

Field services officers, including court services officers and community corrections officers, will be responsible for the preparation of the Presentence Investigation Report (PSI). The PSI report is mandatory in all felony cases under the KSGA. The primary purpose of the PSI report is to provide complete and accurate information about the criminal history of the offender, because criminal history is one of the two primary determining factors of the appropriate sentence established by the guidelines for the crime(s) of conviction. Consequently, the Criminal History Worksheet is an essential component of the PSI report. The PSI report will contain a computation of the presumptive sentence provided by the guidelines for the crime(s) of conviction, based on the crime severity level provided by the guidelines and the criminal history of the offender. The PSI report will not contain socio-economic information about the offender and should not contain sentencing recommendations to the sentencing court.

The criminal history worksheet should indicate the officer's source of information for each prior conviction listed, and copies of any verifying documents available to the officer should be attached, including criminal history worksheets prepared in prior cases in which sentencing occurred after July 1, 1993, and in which the worksheet was prepared in accordance with the requirements of the KSGA.

The criminal history worksheet can be challenged for accuracy by the defense or the prosecution, and a hearing will then be held in which the prosecution has the burden of proving prior convictions through certified copies of journal entries or any other properly authenticated documents and proving by a preponderance of the evidence that any challenged component of the history is correct. The sentencing court has the duty and authority to correct any errors. A PSI report that has been prepared in accordance with the requirements of the KSGA after its effective date of July 1, 1993, can be the subject of judicial notice by a sentencing court in any subsequent felony proceeding. See K.S.A. 2004 Supp. 21-4714(f).

NOTE: The following information is not relevant to establishing an offender's criminal history classification under the KSGA. **Thus the following types of prior criminal activity should not be recorded on the Criminal History Worksheet.**

Juveniles: Do not include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in an adjudication.

Adults: Do not include traffic infractions, diversions (except DUI diversions for subsequent DUI convictions and involuntary manslaughter while driving under the influence of alcohol or drugs), contacts with law enforcement, or arrests not resulting in conviction. Prior convictions should be recorded in descending order by the date of conviction, starting with the most recent conviction.

The 2005 Presentence Investigation Report form contains a section on the last page of the form to be used by field services officers to indicate which criteria of K.S.A. 2004 Supp. 75-5291(a)(2) is met by an offender who is being recommended for placement in a Community Corrections program. Field services officers completing PSI forms need to make certain to indicate for the sentencing court the specific box or boxes under which the offender may qualify for placement in Community Corrections.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR CLERKS OF THE COURTS

Providing documentation of prior convictions

Because of the heavy focus on criminal history under the KSGA and the need to verify prior convictions that are counted in criminal history scoring, Clerks of the Courts may receive requests for certified copies of Journal Entries and other documents, including requests from other jurisdictions.

Presentence Investigation Report

The Presentence Investigation Report (PSI), *with the exception of the sections containing the official version, the defendant's version, victim comments, and psychological (including drug and alcohol) evaluations of the defendant*, will be public record and can be kept in the court file. See K.S.A. 2004 Supp. 21-4714.

Copies of required documents

A copy of the Journal Entry of Judgment, the Presentence Investigation Report and the Criminal History Worksheet of the Presentence Investigation Report, all on the mandated KSGA forms, must be attached together and forwarded to the Kansas Sentencing Commission within 30 days of sentencing. See K.S.A. 2004 Supp. 21-4714(g) and 22-3439(a).

A copy of the Journal Entry of Probation Revocation must be sent to the Kansas Sentencing Commission, along with a copy of the original Journal Entry of Judgment, the Presentence Investigation Report and the Criminal History Worksheet within 30 days of the final disposition. See K.S.A. 2004 Supp. 22-3439(b).

Extended jurisdiction juvenile cases

Under K.S.A. 38-16,126(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment form must be completed for these cases.* A box is located in the "Special Rule Applicable" section of the adult journal entry form to indicate that the journal entry is for a case where "Extended Jurisdiction Juvenile Imposed." A copy of the Journal Entry for the extended jurisdiction juvenile sentence must be forwarded to the Kansas Sentencing Commission within 30 days of sentencing, just as is the case with adult felony offenders.

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Appendix A

**Selected Kansas Case Law Decisions
on Topics Related to the
Kansas Sentencing Guidelines Act
and Sentencing Issues Since 1993**

Appendix B

**Selected Attorney General Opinions
on Topics Related to the
Kansas Sentencing Guidelines Act
and Sentencing Issues Since 1993**

Appendix C

**Approved and Disapproved Non-Statutory Departure Reasons
Cited by Sentencing Courts Chart**

The Appendix A, B, and C sections of the Manual are available on the Kansas Sentencing Commission website, located at: www.accesskansas.org/ksc.

Appendix D

KSGA Forms and Instructions

Presentence Investigation Report

Criminal History Worksheet

Journal Entry of Judgment Form

Journal Entry of Probation Revocation Hearing Form

The KSGA sentencing forms contained within this Manual, including the Presentence Investigation form, the Criminal History Worksheet form, the Journal Entry of Judgment form and the Journal Entry of Probation Revocation Hearing form are available on the Kansas Sentencing Commission website: www.accesskansas.org/ksc. These 2005 forms include changes resulting from legislation effective July 1, 2005 and must be used in all applicable proceedings.

Appendix E

Felony Crimes

Sorted Numerically by Statute Number

Sorted Alphabetically by Description

Sorted by Severity Level and then by Statute Number

Appendix F

Misdemeanor Crimes

Sorted Numerically by Statute Number

Sorted Alphabetically by Description

Sorted by Class and then by Statute Number

Appendix G

Sentencing Grids

Sentencing Range – Drug Offenses

Sentencing Range – Nondrug Offenses